Revolution and Reconstruction.

TWO LECTURES

DELIVERED IN THE

LAW SCHOOL OF HARVARD COLLEGE,

IN

JANUARY, 1865, AND JANUARY, 1866.

By JOEL PARKER,

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REVOLUTION AND RECONSTRUCTION.

LECTURE I.

DELIVERED JANUARY 27, 1865.

Gentlemen of the Law School :

I have heretofore taken occasion to say, that I had for a time some hesitation respecting the expediency of discussing, in the Lecture-room, topics of present interest on which men differ widely, and respecting which some of you may have strong as well as diverse opinions. But no little consideration of the subject has led me to the conclusion, that it is not only expedient, but that it is a duty which I owe to the School, to lay before its members such legal views and opinions as my studies have led me to entertain respecting the fundamental principles of the government under which we live, and the application of those principles to the momentous questions of the day; notwithstanding the diversity of opinion which exists. And, under that conviction, I have more recently spoken freely respecting questions of Constitutional Law, urging, in some instances, legal views in direct opposition to the dogmas of the different political parties.

I shall trust to your candor to justify, or at least to excuse, as free a discussion of the subject-matter of the present lecture, even if some portion of it may not be so exclusively legal in its characteristics. That part is so connected with the legal discussion, and so prominently before the people at the present time, that it may not well be omitted.

My subject is *Revolution* and *Reconstruction*, and belongs appropriately to my course upon Constitutional Law.

Whether we admit it or not, whether we perceive it or not, we are in the midst of a double attempt at revolution.

One attempt is the rebellion of the people of the Southern States, by which they have hoped to dissolve their connection with the United States, and to establish a separate independent Confederacy.

The other is the attempt, of persons who appear to control the majority of the Northern States, to make this war one which shall change the laws and institutions of the seceding States, so called, by the abolition and prohibition of slavery; and to do this in those parts of the country still held by the rebels, against the will of the people there, by the exercise of some power for that purpose, operating beyond the mere power of force by and through which the war is waged; or, in other words, in some mode beyond the liberation which is effected by the armies in the field.

Both parties claim a right to execute their purposes consistently with the provisions of the Constitution.

The one party argues that the Union was but a confederation of States, each having the power to judge when and for what causes it should dissolve its connection with the others; so that secession is but a peaceful dissolution of a compact between States, which compact each State has the right for itself to dissolve at pleasure, and that the war which is waged against secession is unjustifiable.

The other party, denying the right of secession, and maintaining that the attempt to secede is rebellion, and if successful, revolution, has adopted, as an incontrovertible truth, that slavery is the root and cause of the rebellion; and that in order to suppress it, we must extirpate the root and destroy the cause. And the argument is, that there is therefore a constitutional right to effect that object, by the exercise of the power of the government of the United States, under the Constitution as it at present exists.

This assertion, that slavery is the root and cause of the war, is received as a great political truth by very many persons who fail to perceive that if it were true, the argument and conclusion founded upon it by no means follow.

The argument which attempts to maintain that secession is constitutional, is simple in its statement, although founded on

false premises and illogical in its conclusion. Assume that the Constitution is a compact, any infraction of which will dissolve the obligation of it, and it might follow, that as there is no common arbiter, each State must judge for itself when the contract is broken, and may proceed to a separation by an act of secession, were it not that on the assumption of such a compact, every State must have a similar right to judge whether there had been a breach, and if some, a majority at least, should determine that there had been no infraction, no case could arise for the exercise of the right to secede. The majority of the States, if not each State, would have at least an equal right to decide that the compact had not been broken, as any one could have to determine that it had been; and so the decision of one State that it was broken, would be negatived by the determination of others that it was not. — But, besides this, the premises are entirely false. The Constitution is not a compact in any such sense as this argument assumes. It is a misuse of terms to call a fundamental law a compact.

The argument on the other side is not quite so simple. In fact the various, and to some extent contradictory, reasons urged, serve of themselves to cast some suspicion over the soundness of it.

Assuming that slavery is the root and cause of the rebellion, the constitutional power to abolish it, by any exercise of the authority of the United States, is not apparent from that fact merely; and the advocates of the constitutional power are by no means agreed upon the clause of the Constitution which authorizes the abolition, the instruments by which it is to be made effectual, or the manner in which it is to be accomplished.

The position that slavery is the root and cause of the rebellion will not bear a critical examination. Other things have had a more direct influence in producing the rebellion than slavery, which, however, has been made the prominent pretext.

If there had been no unhallowed ambition of persons, no lust for political power, no antagonistic industrial interests, and no sectional rivalry and hatred, slavery would not have caused a rebellion. Undoubtedly it may have had an influence, remotely, in producing or fostering some of the more direct motives and inducements which led to rebellion.

But if it be assumed that slavery was the root and cause, we

by no means reach the conclusion that there is any constitutional power in the United States government to destroy it, except by an amendment of the Constitution.

It does not follow, that in order to suppress a rebellion, or even to provide against the recurrence of one, the root and cause of it must be extirpated.

It is well known that we were almost on the eve of a rebellion, by South Carolina, in 1830. The root and cause of that rebellion, if it had broken out, might, to a superficial observer, have appeared to be the tariff, and unquestionably the tariff would have held the same relation to that war, had it occurred, that slavery holds to this, so far as regards the cause of it.

But no adherent of the administration, at that day, would have promulgated the doctrine, that to suppress the rebellion and provide for the future, we must destroy the tariff.

And should slavery be now subverted, and the southern States continue the production of cotton, with the profit heretofore derived from its culture, which, it is stoutly maintained, may be done with free labor; it must be quite evident, that when the South is filled with free laborers, the antagonistic industrial interests of the two sections may (though perhaps not in our day) cause another rebellion at the South, all the more successful, because, with a population of free laborers, it might be madness on the part of the North to resist such an attempt at revolution.

The attempt of the South to secede has not been placed upon the ground of that intolerable oppression which justifies a forcible disruption of the government, contrary to the provisions of the Constitution; in other words, by a revolution.

And so, on the other hand, the effort to abolish slavery has not been placed upon the ground that the unwarrantable attempt at revolution by the South justifies a counter-revolution, which shall effect such a change in the institutions of the southern States as will leave no longer an inequality in the representation in Congress, and which shall remove all further controversy about fugitives from labor, and about the alleged right of southern masters to introduce and hold slaves in the territories of the United States, and to hold them temporarily in the free States. These things, although not the root and cause of the rebellion, were, to a very considerable extent, the pretext

for it, and the means of excitement relied on to "fire the southern heart" and accomplish a union among the southern people not otherwise attainable. The strenuous effort to secure the introduction of slavery into the territories, was not so much because it was supposed that the industrial interests of the South required that measure, as it was because the political power of the South was in danger, unless slave States could be created fast enough to counterbalance, in the Senate at least, the increase of free States.

And there would certainly have been some color of reason, in making the rebellion the occasion for a counter-revolution, which should relieve the Union from an inequality of representation, the consideration for which had entirely failed because the corresponding burden of taxation was not borne by the States which had the advantage of the inequality, the revenue of the country being provided for by other modes than direct taxation; and should likewise remove a cause of dissension between the sections, which though not the cause of the rebellion, had been the means of procuring very substantial support for it.

It might well have been urged also, that such a counter-revolution was but a just punishment for rebellion. Regarded as a punishment, whether any measures should be devised to prevent it from falling upon others than the guilty parties, as by compensation for emancipation, or otherwise, might be the subject of further consideration.

The great objection to an open attempt at a counter revolution, of such a character, would be, in my view, its tendency to give success to the rebellion itself, by causing more united and persistent efforts to resist such a subjugation of the southern States.

God forbid that I should be supposed to entertain any sympathy with slavery. I desire to record my utter detestation of it, in all its forms, whether it be the black slavery of the southern States, the coolie servitude of the kidnapped Chinaman, or the more odious because more mischievous, white slavery which results from the voluntary surrender of the conscience, and all the faculties of the mind, to the uses and purposes of a political party; so that the slave to party neither sees, nor hears, nor thinks, except as the leaders of the party

direct, and to all human appearance has no soul to be saved, except a party soul, not worthy of salvation. Whether this form of slavery results from an inordinate desire for the supposed honors, and the actual spoils, of office; the hope, or the enjoyment of profitable contracts; or from passion, prejudice, and ignorance, it is the most mischievous form of slavery which can exist in a republican government, be the other what it may. The horrors of this slavery outmatch those of African bondage. I do not pause to describe the original surrender to captivity, the dreadful "middle passage" in which conscience is stifled and political rectitude thrown overboard, or the infamy of the servitude to which the partisan is subjected, or subjects himself, when he becomes the mere tool and slave of leading politicians, instead of a thinking, reasoning, free-acting intelligence, worthy of a liberty of which he can make use for the benefit of mankind. I commend to your special scorn and detestation all slavery, and especially this form of it.

All legitimate and lawful efforts for the destruction of political slavery, by the curtailment of patronage, the enforcement of official accountability, the punishment of bribery and malversation in office, the security of the freedom of the ballot, and the diffusion of knowledge and of sound principles, have my unhesitating and unwavering commendation and support.

And constitutional, lawful and proper measures, which shall tend to the extinction of African slavery, have in like manner my heart and hand, tongue and pen, if it may be, to speed them to their ultimate success.

To that emancipation, through the operations of the war, which practically severs the relation of master and slave, and removes the latter from the jurisdiction in which he has been enthralled, I perceive no constitutional objection. It is one of the incidents of a state of warfare, arising out of the rebellion; and cases of that character cannot fairly be regarded as within the scope of the constitutional provision for the rendition of fugitive slaves; for when the relation of master and slave is actually severed by the war, the slave may go where he will, and cannot be regarded as a fugitive.

To an amendment to the Constitution, which shall in the most expedient mode, terminate African slavery, with due re-

gard to the welfare of the slave, I give my most hearty support; believing that the people of the United States, when they formed the Constitution, might have inserted such a provision into that instrument, and of course that it is within their power to supersede the State authority, and the State laws, in that respect, by an amendment of that instrument according to the modes and forms therein prescribed. If the rebellion has made the adoption of such an amendment practicable, as it would not now have been but for the rebellion, it is one of the very few good things which that ill-advised and wicked measure will have accomplished.

I favor no proposition to rebels in hostile military array against the United States and the Constitution, or any peace except upon the condition that they first lay down their arms, and submit themselves to the lawful authority of the Government, upon a proper amnesty. I do not allow questions of expediency to intervene, and prevent the assertion of the rightful supremacy of the nation, by such force of arms as shall give no encouragement to another rebellion without sufficient cause. On the question whether the war shall be prosecuted vigorously, on the basis of the resolution of Congress, to compel unqualified submission, and restore the constitutional rule of the United States, my answer is an unhesitating affirmative; and I am ready, if need be, on that issue, to take the field and render such service as I may. It is only when the question comes, whether we shall intermix with that, other issues, which may render our success doubtful, and perhaps insure the triumph of the rebellion, and with it the establishment of slavery beyond our possible control, that I dissent.

I shrink also from revolution, masked under the cover of an assumed constitutional authority, derived from false constructions of the Constitution. I start back from the abyss which yawns before us, when with a country of such extensive limits and sectional prejudices, of such varied, and to some extent conflicting, interests, of such diverse modes of thinking and feeling, we lay a sacrilegious hand upon the fundamental law, which made us, for certain great national purposes, an entire people, — upon the ark of salvation which received our fathers into its safe keeping, when the deluge of anarchy was rising around them, and seemed about to overwhelm the prosperity of the

country, and in and through which we have heretofore rested safely, as a nation, on what appeared to be the Ararat of constitutional liberty.

And more especially do I look with dread to the future, when we have entered upon such a revolution, not with the honest confession that it is revolution we are seeking, that we are exercising powers aside from and beyond the Constitution, and endeavoring to change the powers of the government by a resort to measures which the Constitution does not authorize; but instead thereof are attempting to give the cloak of constitutional authority to the adoption of such measures, by most unwarrantable constructions of the fundamental law, — constructions which pervert its meaning, and render it no longer a safeguard against despotic power.

My purpose at this time is to show, that in the efforts to destroy slavery, except by the actual operations of the war severing the relation of master and slave, or by an amendment of the Constitution, we are not only in the midst of a revolution, but that it is one which, if successful, subverts in effect the guarantees of the Constitution, and gives the death-blow to constitutional liberty.

For the assertion that we are in the midst of a revolution, I have an authority which you will doubtless recognize as sound and sufficient.

The Bussey Professor, in the closing lecture of the last term, upon the "Duty of the Profession to the Times," said: —

"It is idle to suppose that if the loyal States succeed, as they are confident of doing, in putting down this rebellion, that the affairs of state are to settle down into order, and resume their accustomed course and current, of their own accord. Whoever expects this forgets the strain and violence which every part of the government has received in a war of such unprecedented character and magnitude. New compromises, new limitations, new restraints, and in many things a new policy, are to be devised; and the process of reconstruction and restoration of government to its proper functions again, is to be effected gradually, and by conforming to the altered condition of things." — "That this can be, nay more that it will be, done, we have every reason in the history of the past to hope and believe. To accomplish it may require great and marked changes in public sentiment and feeling," &c. — *Law Reporter*, July, 1864. pp. 481–2.

And again he said: —

"Now what is wanting to prepare the country to adopt and sustain the requisite changes in the details of governmental policy, is that there should be a pervading sentiment in favor of whatever this may be. I do not propose, even if I had the time to do so, to examine and inquire what those changes should be; I assume that some changes must be made, and my only object is to see how this may be peacefully done." p. 482.

Now it is very apparent, that my learned colleague, in the use of this language, did not mean merely a reorganization of the States where the people have attempted to secede, by some measures to produce the election of officers under their old constitutions, and with their former State rights. If that were all, upon the suppression of the rebellion some measure is to be resorted to, which will give the semblance of legality to the assembling of the people, for that purpose, in their primary meeting. Whatever measure is adopted will not be warranted by any existing statute. It is *casus omissus*, and must be provided for accordingly, perchance by a proclamation of a military governor for the time being. The only difficulty would be in the first step. That once taken, all the subsequent processes would be directed and controlled by the State statutes, made before the rebellion, for the regulation of elections.

Such a course of procedure is *Reorganization*, and could in no sense be denominated *Reconstruction*, and would require neither new compromises, new limitations, new restraints, or changes of any kind, except some changes from life to death, and perhaps from affluence to poverty, through the punishment of the principal traitors.

But my colleague was even more explicit on this point as he proceeded. He said: —

"You are ready now, I presume, to understand what I ought perhaps to have said with less circumlocution, when I say that I look to our own profession, in this country, more than to any other class of men, to take the lead in the great moral and political revolution through which the nation is to pass before it settles down into quietness and peace."

He subsequently says: —

"What I want to impress upon you, as you go out from here to

enter upon your several spheres of usefulness and duty, is, that you owe it to your country, to posterity, and the world, that you qualify yourselves to think, and judge, and discriminate, and that you give to others the results of your own honest sentiments and convictions."

I join most heartily in this attempt to impress upon the members of the School the full sense of the duty which they thus owe to their country, and the responsibility attaching to the due performance of it. And I urge you, most emphatically, not to form your opinions respecting constitutional rights and constitutional duties, upon partisan newspaper paragraphs, stump speeches, flippant discussions in periodicals of higher pretensions, dignified assertions of opinion by those who assume a knowledge of all constitutional law without any study of it, heated Congressional debates, or even *sophistical* arguments by ambitious politicians who are members of the profession. But I appeal to you to seek your knowledge at the fountain-head, by an exhaustive study of the Constitution itself, and of its history, with that of the State constitutions, and to form your own opinions, upon what you shall find to be true upon such research.

In many instances the true construction of the Constitution can only be learned from a study of its history.

And for the purpose of aiding you, if I may, in this research, and of thus performing, so far as in me lies, my duty in the premises, I propose not to rest upon authority, ample as it is, to show the revolutionary nature and character of the recent attempts to press the Constitution into a service for which it was never framed, and which it cannot perform; by calling your attention to some of the arguments which have been made to prove a constitutional power in the United States to abolish slavery, and the tendency of those arguments to the subversion of the guaranties of liberty contained in the Constitution; and then to the answer to them, which answer seems to me to be complete and unanswerable.

It seems to have been generally conceded, that the United States have no power to abolish slavery in the States in time of peace. But if the provisions of the Constitution, upon which it is contended that the power exists in time of war, may be invoked to sustain that position, others may be construed, with equal facility, to confer the power at any and at all times. And

if those arguments are sound, then upon the same kind of reasoning, almost anything else may be done, by the United States, which the party in power for the time being shall deem best calculated to perpetuate its ascendency. If this perversion of the provisions of the Constitution involved only the existence of slavery we might be disposed to acquiesce, even if we could not concur. But it strikes much deeper than that.

Before I proceed to the consideration of some of the principal arguments to which I have alluded, permit me to call your attention to a few historical facts which must form the basis of all sound reasoning respecting the powers of the States, and of the United States, and their relations to each other.

The thirteen colonies of Great Britain, lying along the shores of the Atlantic, and which achieved their independence in 1776, were, in their colonial origin, separate and distinct. Instances occurred where two were under the same Governor, but their legislative assemblies and their judiciary were entirely independent of each other, and so continued at the time of the Revolution.[1]

There were articles of confederation between the colonies of Massachusetts, Plymouth, Connecticut, and New Haven, in 1643, "for mutual help and strength in all future concernments," "by the name of the United Colonies of New England."

The articles declared that the United Colonies, for themselves and their posterity, entered into a firm and perpetual league of friendship and amity, of offence and defence," &c.

But the same articles expressly reserved to each colony an entire and distinct jurisdiction.

Commissioners were to meet annually, each colony sending two, who were always to be church members, and who were vested with plenary powers for making war and peace, and laws and rules of a civil nature and of general concern. Especially to regulate the conduct of the inhabitants towards the Indians, and towards fugitives, and to provide for the general defence of the country, and for the encouragement and support of religion.

The articles made provision —

[1] The connection of New Hampshire with Massachusetts from 1640 to 1680 forms an unimportant exception.

"that all servants running from their masters, and all criminals flying from justice, from one colony to another, should, upon demand and proper evidence of their character as fugitives, be returned to their masters, and to the colonies whence they had made their escape, that in all cases law and justice might have their course."

Here we have the first fugitive slave-law, the first "covenant with death and hell," (twenty-three years after the settlement of Plymouth,) a New England fugitive slave-law, a Puritan fugitive slave-law.

With a gingerly care in the use of terms, which was substantially followed afterwards by the framers of the Constitution, the fugitives to be delivered up were denominated "servants." But a servant who, escaping from his master into another jurisdiction, is there liable to be seized, delivered up to his master, and returned to the jurisdiction from which he has escaped, is a slave, whatever he may be called, and whether he be black or white or copper-colored.

Trumbull (1 Hist. of Conn., 92) informs us that, in 1637, the Pequot women and children who had been captivated were divided among the troops. Some were carried to Connecticut, and others to Massachusetts. The people of Massachusetts sent a number of the women and boys to the West Indies, and sold them for slaves.

We do not need to be specially informed that those who were retained were slaves also under the name of servants.[1]

There was a union of all the colonies, proposed at a meeting of some of them, in conference with the Six Nations, to concert measures of defence, in 1753, and articles of union were drawn up. But that union never took place. The British government discountenanced it, fearful that, in the union of the colonies, there might be a strength prejudicial to the home government; and some of the colonies were jealous of the influence that might be possessed by the crown in such a union.

When, subsequently, the controversy with the crown approached its crisis, a unity of interest, in the great questions pending, led to mutual consultation, and a mutual determination to support each other, and particularly to sustain those colonies against which the measures of the crown pressed with the greatest severity. And when the Revolution commenced,

[1] See Appendix, Note A.

the several colonies, acting separately, sent delegates to a general congress of the colonies, in which congress each colony had one vote.

The first Congress, of 1774, adopted a Declaration of Rights, in which they asserted, among other things, that the *respective colonies* were entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law.

All the union which existed was entirely voluntary, for mutual action in reference to the common danger, and in support of principles in which each had a common interest. The colonial organizations remained entirely distinct, and thus they passed into distinct States, upon the declaration of independence.

The Declaration is one in which all the colonies united, through their delegates, and the recital of grievances is made as if they were those common to a united people.

But in the Declaration, with which the document closes, while it appears to be that of the "Representatives of the United States, in general Congress assembled," made "in the name and by the authority of the good people of these colonies;" it is solemnly published and declared, "that these united colonies are, and of right ought to be, *free and independent States*," — "that as free and independent States they have full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which independent States may of right do."[1]

Here is a distinct assertion, not that the united colonies were a free and independent nation or republic, but that they were *independent States*.

Virginia had shortly, prior to that time, adopted her State

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[1] It was precisely because each of these States had the right to establish commerce, and that the Congress of the confederation had not that right, that there was a necessity for a Constitution which should take away that portion of sovereign power, and confer it upon the Congress of the United States, under the Constitution. It was equally true that the other sovereign powers, thus mentioned in the Declaration, belonged to the new States separately; although there was not the same occasion or temptation for their separate use of them.

constitution, wholly independent of any action of Congress, though doubtless in anticipation of it.

In fact as we have seen, Congress was but an assemblage of delegates, appointed by the separate voluntary action of each Colony or State, and there was nothing except the common bond of mutual interest which held them together.

"The fundamental principle of the Revolution," says Mr. Madison, "was that the colonies were coördinate members with each other, and with Great Britain, of an empire, united by a common executive sovereign, but not united by any common legislative sovereign. The legislative power was maintained to be as complete in each American Parliament as in the British Parliament. And the royal prerogative was in force in each colony, by virtue of its acknowledging the king for its executive magistrate, as it was in Great Britain, by virtue of a like acknowledgment there. A denial of these principles by Great Britain and the assertion of them by America, produced the Revolution."

Of course the declaration that they were absolved from all allegiance to the British crown, and that all political connection between them and the State of Great Britain was totally dissolved, left them their separate legislative power complete, as before, and they thus became, according to their Declaration, free and independent States. The executive authority, common to all, was cast off, but no other common executive authority was established, or contemplated. Each State had the right to establish, and did establish, a separate executive authority for itself.

It is not perhaps generally known, that this Declaration was authorized, or ratified, by each colony acting separately. Eleven of the colonies, in some form, empowered their delegates to make a Declaration of Independence. South Carolina gave a general power to act on the subject, February 16, 1776. Maryland voted in favor of it June 28. Others in the intermediate time.

But what is perhaps quite as conclusive, to show that it was the several act of the colonies, although they united in the Declaration, was, that New York and Delaware, which had not given a previous authority, concurred in the Declaration after it was made.

It is perhaps still less familiar to us, that in most, if not all, of the colonies, which authorized it to be done, it was made an express condition, in the act by which the power was conferred, and which contemplated at the same time a confederation of the new States, that *the colony or new State should retain the sole and exclusive right of forming its own government, and of regulating its internal concerns and police.*

It may not be amiss to cite the particular phraseology of some of these resolutions.

North Carolina, April 12, 1776, "Resolved, that the delegates for this colony in the Continental Congress be empowered to concur with the delegates of other colonies in declaring independency, and forming foreign alliances, reserving to this colony the sole and exclusive right of forming a constitution and laws for this colony, and of appointing delegates from time to time (under the direction of a general representation thereof), to meet the delegates of the other colonies, for such purposes as shall be hereafter pointed out."

Virginia, on the 15th of May, "Resolved unanimously, that the delegates appointed to represent this colony in General Congress be instructed to propose to that respectable body to declare the united colonies free and independent States; absolved from all allegiance to, or dependence upon, the crown or parliament of Great Britain; and that they give the assent of this colony to such declaration, and to whatever measures may be thought proper and necessary by the Congress for forming alliances, and a confederation of the colonies, at such time and in the manner as to them shall seem best: Provided that the power of forming government for, and the regulations of the internal concerns of the colony, be left to the respective colony legislatures."

The General Assembly of New Hampshire June 15th, unanimously instructed their delegates "to join with the other colonies in declaring the thirteen united colonies a free and independent State" . . . "provided the regulation of our internal police be under the direction of our own assembly."

The "deputies of the people of Pennsylvania, assembled in full provincial conference," June 24th, unanimously declared their "willingness to concur in a vote of the Congress, declaring the united colonies free and independent States, provided the forming the government and the regulation of the internal police of this colony be always reserved to the people of the said colony."

The Connecticut Assembly, June 14th, "Resolved, unanimously, that the delegates of this assembly in general Congress be, and they are

hereby, instructed to propose to that respectable body to declare the united American colonies free and independent States. . . . And also that they move and promote, as fast as may be convenient, a regular and permanent plan of union and confederation of the colonies for the security and just preservation of their just rights and liberties, and for mutual defence and security, saving that the administration of government and the power of forming governments for, and the regulation of the internal concerns and police of each colony, ought to be left and remain to the respective colonial legislatures, and also that such plan of confederation be laid before such respective legislatures for their previous consideration and assent." [1]

These extracts from the proceedings in the several colonies are sufficient for the purpose of showing the authority which was given to make the Declaration of Independence, and the restrictions and limitations under which it was made. They serve to show that the language of the Declaration, declaring the colonies free and independent States, was a well-considered exposition of the purpose and effect of the act. New Hampshire, it seems, had authorized her delegates to join in a declaration that the thirteen united colonies were a free and independent State; [2] but the language of the authority given by Virginia to declare them free and independent States, was that adopted by Congress. The language of the resolve of the Connecticut assembly shows that the contemplated confederation of the colonies was to be for the security and preservation of their just rights and liberties, and for mutual defence and security, and not for the formation of a national government. And they all show with what care the several colonies reserved to themselves the right of forming their own governments, and regulating their internal affairs.

This determination to retain the right to regulate their own internal affairs will be found in all their subsequent history.

That the power so retained and reserved, extended to the regulations of foreign commerce, appears not only from the fact that the exercise of that very power by the several States, was

[1] For these extracts from the proceedings of the several colonies, I am indebted to the kindness of Hon. Richard Frothingham, of Charlestown. See an article by him in the *Boston Post*, March 2d, 1854.

[2] It is possible that there may have been an error in copying the resolve of this colony, and that the language was similar to that of the other colonies in this respect.

one of the principal causes which led to the formation of the Constitution, but from the fact, also, that North Carolina, refusing for a time to adopt the Constitution, collected duties upon her own authority, without objection; which, however, she directed to be paid into the common treasury.

The union for the purposes of the common defence, and for the promotion of the common interest, was doubtless in the contemplation of all at the time of the Declaration of Independence, but the formal Articles of confederation, adopted afterwards, show how jealously the several States guarded their State independence, and their State rights.

Some persons have been disposed to treat the Declaration of Independence,—as if what Mr. Choate aptly termed its "glittering generalities," were Constitutional Law,—as if the assertions contained in it, "that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness"; constituted, of themselves, an abolition of slavery, or conferred some right upon the General Government to abolish it.

But to this the answer is cogent: slavery existed in all the States at that time; and it never entered into the heart of man, at that day, to conceive that these assertions affected the *status* of the slave.

If we take the words of those who drew, and those who sanctioned the Declaration, we must take them with the meaning which they attached to them.

It will be difficult to maintain, as a precise enunciation of truth, applicable to all particular cases, the assertion that all men are created equal. Whether we refer to mental qualifications, or physical endowments, or political or social position, or to any other relation, it is not necessary, in order to controvert this position, in its application to the particular relations of mankind, to adopt the criticism that it is not men, but children who are created.

There are other clauses which, if they can be maintained at all, are expressive of general, rather than particular, truth.

We come next to the consideration of the Articles of Confederation, adopted in Congress, November 15th, 1777, but which were not ratified by all the States until 1781.

The first article is, "The style of this Confederacy shall be the United States of America." The second is, "Each State retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States in Congress assembled." [1]

By the third article the States severally entered into a firm league of friendship with each other, for their common defence, and security of their liberties, &c.

It was in form and purpose essentially a compact. The Confederation acquired nothing by the success of the war. It achieved no independence for itself, or for Congress. It claimed none of the territory wrested from Great Britain. Not an acre of it belonged to the United States, in Congress assembled, upon the Declaration of Independence, nor to the Congress under the Confederation, on the close of the war; nor until some portion of it was ceded, afterwards, by the States in which it was situated. Some of the States which claimed large tracts of vacant land, as contained within their boundaries, made cessions, after the war, for the purpose of paying the debts contracted in the common cause, and perhaps in anticipation of the institution of a more formal government. That was the case with the cession of the territory northwest of the Ohio by Virginia, and the cession of their claims to it by other States. Other cessions followed. The States ceding made their own conditions, as fully as if they had been foreign governments.

We may see here the utter folly of the position, that a State attempting to secede, thereby becomes *felo de se*, and a territory of the United States. Suppose Massachusetts had withdrawn from the Confederation, into what condition would she have fallen territorially? This is a fair test; for none of the States ceded themselves or their territory, or conveyed to the United States any right to their territory in remainder, by the adoption of the Constitution of the United States.

We cannot fail to perceive in all these proceedings, from the confederation of the colonies in New England, in 1643, to and including the confederation of 1778–81, with what care the Colonies in the first instance, and the States afterwards, guarded

[1] See Appendix, Note B.

their separate organizations; and how jealously they stipulated for their independence and sovereign authority, in all matters which they did not expressly yield by the acts of confederation, and by their joint action.

This separate independent organization is inherent in the very existence of the Republic, and must continue to be so, if the Republic is to be maintained.

Very recently I heard a gentleman express the hope that the present controversy would soon be settled, and settled in such a manner that "we should never hear anything more of State rights."

This could only be by the extinction of State rights; and that would result, at no very distant day, in the extinction of a republican government here. Let no one hope that a great centralized government, extending from the Bay of Fundy to the Gulf of Mexico, and from the Atlantic to the Pacific, wielding all the power, and possessing all the patronage, which must of necessity result from the destruction of State rights, could remain, for any length of time, a Republican government.

State rights have been pressed out of their proper sphere, and into antagonism with the Constitution, first by the Virginia and Kentucky resolutions of 1798 and 1799, and subsequently by the mad action of Southern conspirators; but their preservation, in their legitimate sphere, is essentially necessary to the safety of our Republican institutions.

In the Constitution we have an instrument of a different character from the Articles of Confederation which preceded it.

It has none of the distinctive features of a league or compact. In its whole phraseology and general character, it resembles the State constitutions, which are admitted on all hands to be the fundamental laws of the several States. That it is limited, in its operation, to certain purposes, does not affect its nature or character in this respect. It has its legislative, executive, and judicial (but not despotic) departments, and its means of existence, self-sustaining, without the aid of the States, except in the election of senators, and as the people of the States send representatives to Congress. It has provisions regarding the punishment of treason, — treason against the United States, — and of course there is an allegiance due to the government which it constitutes, otherwise there could be no treason. And

that might well settle its character. Treason against a compact, where there was no allegiance, was never yet heard of.

No body of men, whether in an organization called a State, or otherwise, can at their pleasure secede from their allegiance, except by revolution, or by a removal without the jurisdiction of the government to which the allegiance is due. But I am not to discuss that now.

This instrument barely escaped rejection. Supported as it was by the weight of character of those who formed and recommended it, by many of the ablest pens in the country, and especially by the most able writers of the Federalist, it was adopted by very small majorities, in several of the conventions; and its rejection in them would have caused its rejection in others.

Some of the principal objections were that it contained no Bill or Declaration of Rights, such as were found in some of the State constitutions; and that it might therefore be made subversive of the liberties of the people; that there was in it no recognition of the rights of the States; and that it limited, or might be construed to limit, to too great an extent, the powers possessed by the States.

The nature of the objections may be seen in the amendments which were proposed to it, by the conventions, several of which were adopted immediately after the Constitution went into operation. Without an assurance that some of these amendments, deemed most essential, would be adopted, its rejection would have been certain. The great question was whether it should be adopted in the faith that it would be amended in these particulars, or whether it should be rejected, and a new one formed, more satisfactory; and the rejection it was feared would seriously endanger the attempt to form such a government.

Prominent among these amendments you find provisions for the security, of freedom of speech, and of the press; asserting the right of the people to be secure in their persons, houses, papers, and effects, from unreasonable searches and seizures; against the issue of warrants, but upon probable cause, supported by oath or affirmation; and that no person should be deprived of life, liberty, or property, but by due process of law. Also an article that the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people.

Several of the States formed their constitutions during the war. In the Bill of Rights, prefixed to that of Virginia a few days before the Declaration of Independence, there is a declaration against the suspending of laws by any authority, without the consent of the representatives. Another, that general warrants to seize any persons not named, or whose offence is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted. Another, that the freedom of the press is one of the great bulwarks of liberty, and can never be restrained but by despotic governments.

The Declaration of Rights adopted by North Carolina, and made part of her constitution in December of the same year, has similar declarations respecting the suspension of laws and the freedom of the press, and some provisions still more explicit in relation to personal liberty.

The constitution of Massachusetts, adopted in 1780, declares that each individual of the society has a right to be protected by it in the enjoyment of his life, liberty, and property, according to the standing laws; that no person shall be held to answer for any crime or offence until the same is fully and plainly, substantially and formally, described to him; that no person shall be arrested, imprisoned, or despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or by the law of the land; that every person has a right to be secure from all unreasonable searches or seizures of his person, his house, his papers, and all his possessions; that the liberty of the press is essential to security of freedom in a State; that the military power shall always be held in exact subordination to the civil authority, and be governed by it.

These constitutions were made in time of war, and went into immediate operation. They were of course intended for a time of war. It is in war that the security of such provisions is most important to the safety of the citizen.

Provisions substantially similar, found in the amendments to the Constitution of the United States, have there, it must be concluded, a significance and operation, so far as the United States are concerned, like the provisions in the State constitutions from which they were derived.

One of the arguments in favor of the constitutional power to disregard the limitations of the Constitution, is expressed in the assertion, that there must of necessity be a constitutional power in the government sufficient for its own preservation, and that it may do whatever is necessary for that object. The position is, logically, untenable. There is no such controlling necessity. A government may be so constituted that it has not sufficient power for that purpose. The Confederation, under the Articles, was a government with powers and duties, and possessed a governmental character. But it was without the necessary powers for its own preservation if it had been assailed. It was dependent upon the will of the States in many particulars.

I am not one of those, however, who admit, even for a moment, that the Government of the United States has not sufficient constitutional power for that purpose. I maintain, strenuously, that it has ample power, in the ordinary exercise of its functions, without the invocation of arbitrary or despotic power for the purpose.

Another argument introduces, in express terms, a despotic power into the Constitution.

The constitutional powers have usually been divided into the legislative, executive, and judicial, and those powers are, in some shape, inherent in a complete government.

But we have a new expositor of constitutional law, with a different division of the powers of a Republican government.

A general officer whose law and whose laurels seem to be alike deficient, in a recent speech in a neighboring city, argued "that our Government combined several elements of power, — the judicial, democratic, and despotic."

Here are two new constitutional powers. No doubt there is a democratic element in a republican government, but one would suppose that a democratic power, and a despotic power, in a republican government, must be antagonistic, and that there could be no peace until one had subjugated the other.

I confess that I am at a loss to understand what is meant by a democratic power, in such a connection, unless it is intended to assert that anything may be done under the Constitution, which is supposed, for the time being, to represent the popular will.

A despotic power is much more intelligible. But I think it

is one of the modern discoveries in the science of government, which places it by the side of the judicial in the republican government which exists under our Constitution.

That I may not be supposed to have made a mistake, I quote from a report of the speech in a newspaper friendly to the speaker, in which it is said: —

"He then replied to the assertion that the President was despotic, and argued that our government combined several elements of power, — the judicial, democratic, and despotic. The perfection of our government, and where it materially differs from other governments, is, that it has all these elements of power, and presents at one time one feature, and at another time another feature. You know perfectly well," said the General, "that in the constitution and character of an individual, to make a perfect man, he should possess both good qualities and bad qualities. Not that the good shall be exercised for a bad purpose, but that they shall be so moulded and governed as to allow him to act with great power. Without these qualities he may have good intentions and no power; with too much bad quality, he may have great power and no good intention. It is the balancing of these qualities that makes a perfect and good man. Our government, under the wisdom of our fathers, was shaped exactly upon the model of a great and good man. They have invested our government with all the qualities that exist in other governments, so that from whatever point it may be assailed, it will have the requisite means and power to meet the emergencies of the crisis.[1]

Is it intended to be asserted that under our Constitution, at one time, the feature of the judicial element may be presented, and a case allowed to take its regular course in the judicial tribunals; that at another time the democratic feature may be presented, and the administration determine according to what it believes to be the popular sentiment of the day, without regard to the judicial power; and at another, the administration may put its despotic face upon the matter and take its own course, irrespective of the judiciary or public opinion, and without responsibility? If it does not mean this, the question is, what does it mean?

This speech is significant, as it comes clothed with a semblance of authority.

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[1] Report of the Speech of General Banks in *Faneuil Hall!!!* — *Boston Daily Advertiser.*

The despotic element of power is intelligible enough, but to what conclusions will it lead us?

"In the constitution and character of an individual," said the speaker, by way of illustration, "in order to make a perfect man, he should possess both good qualities and bad qualities." . . . . "It is the balancing of these qualities," he adds, "that makes a perfect and a good man. Our government, under the wisdom of our fathers, was shaped exactly upon the model of a great and good man."

Now, as we are not told how much of the devil a man must have in his composition in order to be "a perfect and a good man," we are left in doubt how much of the despotic element of power it takes to make up a good and perfect republican government.

But in the report we are favored with a little insight into the practical application of this despotic power, and have also information how this new doctrine was received by his auditory. The speaker said: —

"We are surrounded by the public enemy; he is here in the city of Boston, and in New York, as well as in the twelve or fourteen insurrectionary States. [Applause.] What power is required, under the Constitution of the United States, to meet this enemy here and elsewhere? [Applause.] It is the despotic power, [cries of Good,] that the enemy in arms should be destroyed, and the enemy in our midst shall be deprived of all power to circumvent or betray the country or its people. [Tremendous cheering.]"

The speaker then proceeded to justify arrests under this despotic power, — arrest without warrant, of course, — arrest at the pleasure of persons in power; which, on the order of some official, consigns the victim to the dungeon, without access of friends, without knowledge of what he is accused, without an opportunity to be heard, with no trial, and no means of liberation.

He says of this theory of arrest: —

"It is purely American, taking its character from the *good* and *generous* heart of the American people. It had its origin in the Constitution. It is a power of arrest that deprives men of the liberty or the privilege to do public harm. That is all."

Yes, that is all, except that the questions who shall be selected

as the victim who is to be restrained from the liberty to do public harm, and how long he shall be restrained, are at the despotic will and pleasure of an irresponsible individual, quite as likely to be exerted to gratify some private grudge as for the promotion of the public good.

The speaker was right when he said that this theory of arrest is not even English, for in Great Britain no such constitutional right, to make arbitrary arrests without responsibility, is admitted even for a moment. The ministers who order an arrest are responsible to parliament, to show sufficient reasons for it, and are exposed to prosecution for it, unless they obtain an act of indemnity.[1]

One of the earliest of the attempts to sustain this theory of despotic power, was that contained in a pamphlet entitled "The War Powers of Congress and the President," which was so satisfactory to the "powers that be," that the author was immediately translated to the War Office.

In this pamphlet he attempted to maintain that the powers granted to Congress, in the 18th clause of article 1st, section 8th of the Constitution, [powers to make all laws which shall be necessary and proper to be exercised to carry into effect the powers vested by the Constitution in the government and officers of the United States,] were, in one sense, unlimited and discretionary; that they were more than imperial; that it was intended by the framers of the Constitution, or by the people who adopted it, that "the powers to provide for the general welfare and common defence should be unlimited"; "that the law of nations is above the Constitution"; and that the amendments to the Constitution, which declare that no man shall be deprived of life, liberty, and property without due process of law; that unreasonable searches and seizures shall not be made; freedom

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[1] Mr. Webster in his magnificent speech, the second in reply to General Hayne, said of American Liberty: "It will stand, in the end, by the side of that cradle in which its infancy was rocked; it will stretch forth its arm, with whatever of vigor it may still retain, over the friends who gather round it; and it will fall at last, if fall it must, amidst the proudest monuments of its own glory, and on the very spot of its origin."

That "fall" would at least seem to have been impending when General Banks, in Faneuil Hall, amid "tremendous cheering," advocated despotic power as one of the elements of constitutional authority, and arbitrary arrests as a legitimate exercise of power under the Constitution.

of speech and of the press shall not be abridged; and that the right of the people to bear arms shall not be infringed; — are not applicable to a state of war.

He must have no very sound appreciation of the nature of our Constitution, or no very high opinion of the intelligence of his readers, who attempts to maintain that the law of nations is above the Constitution in its application to the internal affairs of the United States, — whether those affairs relate to a time of civil war, or to one of profound peace.

And he must have something more than a reasonable degree of modest assurance, who with the history before him to which I have already referred, asserts that the provisions contained in the amendments to the Constitution for the security of personal liberty were not made for time of war.

With the addition of the allegation, substantially, that the President may do anything which the military necessity requires, and that he is the sole judge when the military necessity arises, and what it requires, the most strenuous advocate of despotic power would desire nothing further in time of war, — nor, if the power to provide for the general welfare and common defence is unlimited, and discretionary, and more than imperial, as alleged in this pamphlet, could despotism need any power beyond it, in time of peace.

If the liberties of the people are not utterly destroyed, upon such doctrines, it will be because the ambition of the incumbent of the presidential chair does not lead him to desire to subvert those liberties, and I give him credit that he does not desire it. But the ultra politicians of this despotic school cast their liberties, and those of the rest of the people, at his feet, if he will but choose to trample on them.

Having examined these positions somewhat at large upon another occasion,[1] I propose now merely to refer you to the brief history of the Government, as I have sketched it, for their complete and emphatic refutation.

This remarkable pamphlet has, however, been lauded by great and little periodicals, received the commendation of reverend doctors of divinity as an exhaustive treatise on the constitutional powers of the President and Congress, been mul-

[1] "War Powers of Congress and of the President." "An Address before the National Club of Salem," March 13, 1863.

tiplied in its editions, circulated by societies, and has arrived at last to the dignity of stereotype plates and pasteboard covers.

Even the fine arts have been invoked, not merely to sustain the Proclamation of Emancipation, but to give immortality to this sophistical argument in favor of despotism, under the guise of constitutional law, — a subject which its author did not understand.

Very recently, I have seen on exhibition a picture entitled, "President Lincoln's Emancipation Proclamation before the Cabinet." It is intended to represent the President and Cabinet in consultation upon the subject, and the proclamation lies upon the table. Prostrate upon the floor is the Constitution of the United States; and near by, leaning against the leg of a chair, as if somewhat exhausted by the conflict in which it had achieved a victory over its prostrate victim, is Whiting's "War Powers of the President," swelled in its proportions to a thick octavo volume, either in sheep or in calf; which, does not distinctly appear, but the presumption is in favor of the latter.

It has been our boast that our liberties are defined and secured by written constitutions, unchangeable but by the will of the people expressed in some mode prescribed by them in those constitutions, and that they are therefore not held at the pleasure of the executive, or even of the legislative department. But if this sophistical text-book of ultraism is to be sustained by factitious efforts to give it currency and character, and Generals expounding the Constitution are, with "tremendous applause," to assert that it contains the element of despotic power, — "all the qualities that exist in other Governments," Russia and Turkey of course included, — God save the people from the despotism which is impending over us.

Another of the revolutionary theories, attempted to be justified under the Constitution, is that promulgated in certain resolutions introduced into the Senate of the United States by Mr. Sumner in 1862, the first of which is —

"That any vote of secession or other act by which a State may undertake to put an end to the supremacy of the Constitution within its territory, is inoperative and void against the Constitution; and when sustained by force, it becomes a practical *abdication* by the State of all rights under the Constitution, while the treason which it involves still

further works an instant *forfeiture* of all those functions and powers essential to the continued existence of the State as a body politic, so that, from that time forward, the territory falls under the exclusive jurisdiction of Congress, as other territory; and the State, being, according to the language of the law, *felo de se*, ceases to exist."

The conclusion in another resolution was, that, —

"the termination of a State, under the Constitution, necessarily causes the termination of those peculiar local institutions which, having no origin in the Constitution, or in those natural rights that exist independent of the Constitution, are upheld by the sole and exclusive authority of the State."

These resolutions have the negative merit of not maintaining doctrines which are in subversion of the liberties of the citizens of the free States, and the positive demerit of being at variance with the history of the formation of the States, and of the United States.

As I have discussed them briefly heretofore,[1] it might be sufficient at this time to refer you to the history which I have sketched of the organization of the several States, and the adoption of the Constitution of the United States. But a few incidental remarks may well find a place here.

It is important to discriminate between the action of the States, and of the individuals inhabiting those States.

It is said that South Carolina has seceded; that the State has seceded. This is very well, so long as we use the phraseology to express, briefly, the idea that a convention, elected by a major vote of people in the several voting precincts of that State, has adopted what is called "an ordinance of secession."

If it was within the scope of the power of the people of that State, under the Constitution and Government of the United States, to elect persons to meet in convention, and pass such an ordinance, as the act of the people of South Carolina, then it is true, in a legal sense, that South Carolina has seceded, because if that be so, the ordinance is the act of the State, — of the political organization and existence called South Carolina. But in such case it will be the lawful act of South Carolina, and the ordinance becomes a valid act of secession.

For on the other hand if the people of South Carolina had no

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[1] "Constitutional Law." — *North American Review*, April 1862.

lawful constitutional right to elect members of a convention for such a purpose, and to confer upon them power to pass such an ordinance, then the members not being legally elected by the authority of the State for that purpose, the convention did not represent the State, the members represented only those who chose them, — a certain portion of the people of South Carolina, greater or less, who could not confer such a political power, — and in that view there is no act of the State, no ordinance by the State, and no secession of the State. The political existence legally known as the State of South Carolina is still, in legal contemplation, in the Union, disorganized to be sure by the act of her people who attempt to maintain this ordinance of secession; but the State is not in fault, for the reason that the offence is not committed by the State. The people who concur in the act are rebels against the Government of the United States, and punishable as such, none the less because they have usurped also the authority of the State.

The Constitution and the laws of the United States, especially the provisions in relation to treason, all support this view of the case. No provision is made for the punishment of the offence of a State. The offence is by the individual, and the punishment is upon him. If this were otherwise, and the act were that of the State, the offence would be that of the State, and the State ought to be punished for treason.

It is a recognized rule of international law that the individual is not responsible for an act of hostility which he does by the command of his government; and the better opinion seems to be that even a ratification of the act by the Government, is equivalent to a prior command, exonerating the individual, and substituting the responsibility of the Government. The steamer Caroline was burnt at Niagara Falls, by a party from Canada, sent by order of Colonel McNab, and one or more persons were killed. The British Government avowed the act. The authorities of New York afterwards insisted upon trying McLeod, who boasted that he was one of the party, for murder, but the administration of that day — Mr. Webster being Secretary of State — denied the right of the State to take jurisdiction of the act as one of murder, upon the ground that Great Britain having avowed the act, she alone was responsible, and that the matter was, from that time forth, one between the United States and Great Britain.

On the same principle, if South Carolina is regarded as a State which may hold a State convention and pass an act of secession, which thereby becomes the act of the State, so that the military array within her borders is the act of the State, then although the act is wrongful, that does not make it any less the act of the State; and the individuals concerned in the act itself, and more especially in all subsequent acts of force following it, should be held exempted from any liabilities except such as result from war, and the State be held to her just responsibility. That would constitute a case for war between the United States and the State of South Carolina were there not insuperable objections to such a warfare, arising from the very Constitution of the Government of the United States. To what responsibility can the United States hold the State of South Carolina, as a State, in such case? — not to indictment, trial, and confiscation. It must be the responsibility of war, waged by and against a foreign power, and the result then might be conquest.

It is not perhaps material to the question raised by the Senatorial resolutions referred to, whether the acts of pretended secession and actual war are regarded as the acts of the State, or of the persons who adopt and commit them; for if the State itself is supposed to have done the act, and it be one of wrong and rebellion, the State organization still exists, — exists as a State, and of course the State being a living political existence, there is no State suicide, and no lapse into a territorial condition. The State, instead of being dead, is in active hostility.

But again, if we assume, for the sake of the argument, that this illegal and wrongful attempt to resume its original position as a State, as it existed on the Declaration of Independence, has been, somehow, the destruction of the State, (which in defiance of such an idea retains all the organization of a living acting State,) if we strike out, in imagination, all the semblance of authority in a State because it has forfeited its rights as a State, and we thus find a tract of land inhabited by people, — call it a territory if you please, — that territory which thus presents itself is either an unorganized territory, the people of which have a right to begin *de novo*, or it is a territorial dependence, not of the United States, but it would seem of Great Britain herself; it might be of the old Confederation if that

was in existence. By the treaty of peace, Great Britain ceded her claim to the territory between the Atlantic and the Mississippi. But who was the other party to the cession. Not the United States of America, at present existing under the Constitution, for no such Government or nation then existed. It was to the United States of America, consisting of several States, represented by such authority as existed under the Confederation; that is, a cession of her claims to the several States themselves. The States did not cede themselves to the United States by the adoption of the Constitution. If, then, South Carolina should lapse into an unorganized territorial condition, as that territory has never been ceded to the United States, how is the Government of the United States to make title to it, as a territorial dependency. Perhaps a better title might exist to the territory comprised in the State of Mississippi, if that State should cease to exist as a State.

It may be said that this is a technical legal argument. But no other argument can avail to determine the legal *status* of the States. The theory of State suicide assumes to be a technical legal argument also. The difference between the two is, that the argument above presented leads us to logical results, and the State suicide theory to an entire confusion of legal principles and consequences.

There is another argument, which produces the death of the States attempting to secede, not by State suicide, but by conquest; by force of the arms of the United States, on the successful termination of the war, in the same manner that a conquest may be made of foreign territory.

The number of the "Law Reporter" for August 1864, contains an elaborate article entitled, "The Legal *Status* of the Rebel States before and after their Conquest," attempting to maintain that a civil war exists in the United States, which gives to the parties to it all the rights which exist in the case of a foreign war; that one of these is a right of conquest, that the United States may therefore conquer the seceding States, and treat the territory embraced in them as a conquered country.

It may be true, that after a rebellion, which has assumed such proportions as to be aptly denominated a *civil war*, and after the rebels have been recognized by other nations as belligerents, the parties to that war have, *so far as other nations are concerned*, the same rights against each other as if the war was a

foreign war. As to them, after such acknowledgment of belligerency, it is so. They assume that each party has an equal right to prosecute the war; they profess to stand neutral between the two, as equals, and of course do not regard the rebels as traitors, or their privateers as pirates; they admit the vessels of each into their ports; they treat the territory occupied by the rebels as if it was the territory of the rebels, and claim to enter the ports there as if those ports really belonged to the rebels who are in possession of them.

As to such other nations, therefore, it may be said, that the suppression of the rebellion, and the occupation of the territory by the government assailed, would be conquest, for such suppression and occupation would carry with them all the rights of conquest, *so far as such other nations were concerned.* They would be obliged to respect the change, and treat the ports and territory as having passed into the possession and government of the prevailing party. The case would be the same if the rebels, in the course of the war, should conquer and wrest from the nation assailed, a part of the territory which, in the beginning of the war, was in its undisputed possession.

All this from the operation of the law of nations; and we see, therefore, why, in the discussions found in treatises upon the law of nations, respecting the nature and character of a civil war, and in regard to the relation of other nations to such war, (for in no other relation is the law of nations applicable to such war,) it may well be said, that each party to a civil war has the same rights as if the war was a foreign war. It is a foreign war as to those affected by it in such relations.

But all this has nothing to do with the rebellion, and to a civil war arising out of it, as *between the parties to it in their domestic relations*, if that term may be admissible to describe the relations of the parties. As between the parties to that war, the rebellion, in the outset, is insurrection, — treason. As between them it never for a moment changes its legal character during its continuance, although the success of the rebels may result in revolution. It is treason throughout all its stages. It is not treason in theory only. It is treason in fact. There is no time when the acts of force on the part of the rebels become lawful war, or when they become, as this writer seems to contend, justly excusable during the continuance of the war, and punishable afterwards.

The war may become of such magnitude, and the opposing forces be so nearly equal, that victory may be suspended in the balance, and the scales may incline, first to the one side, and then to the other. And thus it may become no longer expedient for the nation assailed to treat those engaged in the conflict as traitors, because their punishment as traitors would provoke retaliation. And wholesale executions for treason, under such circumstances, might well shock the moral sense of the civilized world. But that neither gives the rebellion nor the rebels legal rights arising out of the war against the constituted government which they have assailed. It does not change the legal *status* of the portion of the country possessed by the rebels, nor in any way sever it from the government to which it belonged before the war, or change its legal relations to that government, so far as the immediate parties to the war are concerned.

If the rebels form a government, or usurp the authority of the existing government, that does not constitute a lawful government as against the government assailed, except in the event of their success.

Their organization may constitute a government *de facto*, coming into existence by usurpation, but through color of election, and the proceedings of that government, in relation to all matters not directly of a rebellious character, may be held afterwards to have validity for State purposes, as the acts of a government *de facto*.

But a government which is such *de facto* only, and not *de jure*, coming into existence merely by color, and not by right, is a wrongful government. Its proceedings, so far as they affect private rights and third persons, may perhaps be permitted to stand, for the prevention of confusion and mischief. Those who act under its orders, in all matters in which the lawful State government might have given similar orders, may be excused. It may well be held, therefore, that it is not treason against a State to obey the orders of the government *de facto* when the powers of the State are usurped.

But the orders of a *de facto* State government cannot be admitted to have an operation, by way of justification or excuse, beyond what those of the government *de jure*, if given in the same case, might lawfully have had. And no lawful State government could rightfully have ordered acts of treason against

the United States, nor in any way have furnished a justification or excuse for such acts of treason. No State could give orders to make war upon the General Government, nor to resist it in the exercise of its proper functions. Still less could any person justify or excuse acts of treason under the orders of the "Confederate States," upon the ground that the Confederacy was a government *de facto*.

How it might be where the party could show that he acted upon compulsion and was not a voluntary agent, and could not, therefore, be held to have had a criminal mind and intent, is a different question, the consideration of which is not important to this discussion, which serves to show that the governments *de facto* of the States could not do or authorize any acts which could result in a conquest of the States. Clearly the lawful State governments could not do so.

It is true also that, in relation to captures of property by the naval forces of a government assailed by a formidable insurrection, a civil war may be treated as if it were a foreign war, for the purposes of determining the right to capture, and the disposition of the property captured.

Captures are for the most part made upon the high seas, and the law of nations generally regulates the rights of capture there. The capture is necessarily made, as it would be if the war were foreign instead of civil, and the law of nations, in relation to prize, is applied for the adjudication respecting the right to capture and the disposition of the prize. In a civil war there may be blockades and captures for carrying contraband goods.

But all this has no relation whatever to the nature and character of the contest generally, as it is prosecuted between the parties, within the territory of the government assailed, where the character of the contest is not changed from that of insurrection and rebellion by such blockades and captures.

Let us not be deceived by the misuse or confusion of words. If all the text-writers on International law should assert that a nation may make a conquest of a part of its own territory, — of a part of itself, — in the suppression of a rebellion, because the conflict which ensued upon rebellion was a civil war, and a civil war gives the same rights as a foreign war, as between the parties to it, they would only stultify themselves. They make no such assertion. That is the illogical conclusion of those who are seeking to accomplish a purpose.

The attempt to apply the law of prize, so as to give a right of conquest, and the effects of conquest as a result of that law, is as absurd as it would be to apply the law of trover to the offence of treason.

The idea that because the rebels organize a government of their own (not in place of, nor obtaining possession of the government assailed), they can excuse their acts of treason, if done in compliance with the orders of their government *de facto*, because the contest has become a civil war, is worthy of a place alongside of the idea that a nation may make a conquest of a part of itself.

The relations which I have shown to exist between the United States and the several States; and between the people of the United States, as an entire but limited government, and the people of each State; preclude the idea of the rebellion of a State, as such, because the State, as such, is incorporated into, and forms part of the greater territorial government constituting, the United States. The State, it is true, is an entire entity — a distinct political existence — for certain purposes and objects, for all lawful purposes and objects, having all political powers except those embraced within, and held by, the government of the United States. But rebellion is not one of the purposes and objects, nor one of the political powers, of a State in the Union. If it seek secession it is an attempt to tear the State from its position as a part of the great whole, which it is unlawful for a State to do, and there can therefore be no action recognized as State action for such a purpose.

So the powers granted to the United States bind the State with bands "stronger than hooks of steel" to its place as part of the United States. It is within a State that the United States are authorized to issue and serve process, hold courts, enforce judgments, levy taxes, and collect revenue.

It is there also that the United States have duties to perform, — the duty to repel invasions, to suppress insurrections, to guarantee a republican form of government, to provide for the necessities and convenience of commerce.

These rights and duties are still in full force, notwithstanding all the votes of secession, the usurpation of the State authority by the rebels, and the formation of a Southern Confed-

eracy, and notwithstanding the war has suspended the active exercise of them.

If it were not for its mischievous tendency, it would be the merest nonsense in the world to assert that the United States could make a conquest of a territory where it possesses such rights, and owes such duties; that the government could in that way not only dispense with its rights, and abandon its duties, but could subvert the very institutions it is bound to protect, even if a majority of the people have unlawfully, and outrageously, if you please, attempted to renounce their allegiance.

If it is conquest, then all the institutions of the State may be changed. If it is conquest, there is no longer any constitutional duty to protect the conquered portion of the country from invasion or insurrection, for the conquest may be abandoned at pleasure; and there is no longer any duty to hold courts under the Constitution, or to provide for the wants of commerce.

No one would attempt to maintain that a State could, by reason of an insurrection in one of its counties, make war upon the county itself, conquer it, and obtain by force a right to change its laws, which right it had before the insurrection; or as a victor to dispose of its entire population, whether or not participating in the insurrection, which right it had not before, and could not acquire by means of the insurrection itself. The duty which the State owed to its loyal population, to its citizens inhabiting the county, could not be cast off in that manner. Its disloyal members it could punish.

This undoubtedly is not "a case in point," for a State in the Union is not a part of the United States, in the same sense and mode that a county is part of a State. The United States cannot make all the laws of a State and govern it, as a State may do respecting a county. A State under the Constitution is, to the extent of everything, not granted directly or indirectly to the United States, or prohibited to the State, an independent community.

Still the State is part of the United States. To the extent to which the United States may make laws affecting the State, and its people as citizens of the State, and to the extent to which the United States owe duties to the State, or to the people of the State, as such, — the analogy holds good. The United States

cannot consistently with the Constitution, acquire a greater right to make laws affecting the internal affairs of the whole State, by reason of the treason of the inhabitants, however numerous the traitors. The General Government cannot by reason of such treason, divest itself of its duties to the State, or to the citizens of the State, who are at the same time citizens of the United States.

Moreover it would be inconsistent with the duties which the United States owe to the other States, to attempt to overcome and make a conquest of a State. When the Constitution was formed, and the United States guaranteed a republican form of government to each State, it assumed a duty to each and all of the States, not only to protect the existence of the several States, but to protect their existence as republican States; and when a State is assailed, the duty of protecting that State, and guaranteeing to it a republican form of government, is not due to that State alone, but to each and every one of the other States.

Furthermore, the term "*conquest*," in its application to war and its results, implies something more than reduction to submission. It is used to mean more in the discussion respecting "the legal *status* of the rebel States before and after their conquest;" for reduction to submission, to wit, the suppression of the rebellion, would not be sufficient to accomplish the purpose. It is perceived that this would give no right to the United States to abolish slavery, and therefore this stretching after something further. Conquest, in such connection, means emphatically *acquisition* by the power of force, and it gives the right to dispose of the conquered territory and people at the pleasure of the conquering nation, subject only to the requisitions of humanity and the rights of other nations, if any they may have.

It is utterly preposterous to say that the United States may, consistently with the Constitution, acquire a State which is not foreign, but which is existing in the Union, or that it can acquire the whole territory of such State. Either would cause the extinction of the State, as one of the United States, and, to that extent, a dissolution of the Union. Such acquisition, *by purchase*, would, under the present Constitution, be revolution. It could not be made consistently with the duty which the government of the United States owes to the whole

people of the United States, to all the other States, and, it may be said, to the State itself, which having duties to perform as a member of the Union, has no power to sell itself, either to a foreign government or to the United States. Still less can such acquisition be made by war and conquest, by reason of the same duties on the part of the United States, and for the additional reason that it is in violation of all those duties to make war upon a State.

No act of a majority of the people of one of the United States, however great that majority, and whether the act be one of negotiation and trade, or one of rebellion, can enable the United States to acquire the State.

Each State being part and parcel of the United States, if the latter could acquire, by conquest, a part of itself, it might conquer itself entirely, by instalments, and thus having swallowed itself, piecemeal, there would be nothing left of it. That, you will admit, would be revolution. There can be no conquest, unless we admit that the State is foreign. That admission makes secession valid, and would show that we had no right to treat as treason the lawful act by which, in that view, secession would have been actually accomplished, and would thus prove that the war which has been waged on the part of the United States was unjustifiable.

The doctrine that the United States can conquer the States, and treat them as territories, is revolutionary. If we mean to have revolution, let us at least call it revolution, and not adopt constructions of the Constitution which render it no better than waste paper, so far as the liberties of the people and the rights of the States are supposed to be secured by it.

LECTURE II.

DELIVERED JANUARY 24, 1866.

GENTLEMEN OF THE LAW SCHOOL:

I propose to speak to you to-day of certain principles of constitutional law.

For a few years past the time has not been favorable for such discussions. For years previous to the late war, the sectional controversies which culminated in that war gave too strong an impress to the minds of the community for the favorable reception of legal truths; and during the time of the war itself, any one whose legal opinions, upon questions connected with it, did not come up to the full measure of the party standard, was very sure, if not denounced, at least to be disbelieved. Great numbers of the people were persuaded that the Constitution must justify whatever they thought the urgency of the case required, and woe to him who could not find, in some provision of the Constitution, that construction which would best serve the demands of the occasion.

The old maxim, *inter arma silent leges*, expresses but half a truth. War does not merely silence the law. It perverts it. It does not merely substitute force as the governing power for the time being, but it makes force take upon itself the name of law, — not only to stand in its place, but to claim to be law itself, and this not merely where martial law may rightly exist, but wherever usurpation extends it.

Most especially has this been true, during the late war, as regards Constitutional Law. There has not been anything that it was supposed it might be desirable to do, in reference to the rebellion, that there has not been some one found ready to swear that the Constitution authorized that very thing. If it was the declaration of martial law (which places all persons under military rule and the power of force, when in legitimate operation), over the whole country, — over places where there

had never been a soldier in arms, except as he enlisted and left forthwith for the scene of conflict, — men were sure that the Constitution authorized it, because they were told that it was necessary for the suppression of the rebellion. If it was the suspension of the *habeas corpus*, which suspension deprives all persons arrested of the right to have an inquiry into the cause why they are imprisoned, — it must be constitutional to suspend it, and to place the whole community at the mercy, or the want of mercy, of those who held power for the time being, because the reason of the hour demanded the suppression of the rebellion; and the unreasoning excitement of the hour acquiesced in any and every measure which it was told was necessary to the accomplishment of that object. If it was the suppression of the trial by jury, and the substitution of court-martials and military commissions; — that time-honored institution, secured by our remote ancestors in the great charter, and reëstablished here in constitutions and bills of rights and statutes, was not only surrendered without a sigh, but men desired to offer it up a sacrifice to evince the sincerity of their patriotism.

The hour was governed and controlled by an imaginary "military necessity," and whenever the party leaders desired that anything should be done, there was at once a military necessity to do it.

It was within the limits of an adjoining State that an ambitious aspirant for congressional honors deemed it expedient, upon the occasion of his nomination, to secure favor by pledging himself, in advance, to support "any military necessity to which the administration should see fit to resort"; which was but the phrase of the day for a pledge to support every arbitrary measure which those who were in power should adopt, — and he was elected. Patriotism has nothing to do with such a declaration. Party subserviency can go no farther than this.

Was it desired to exercise a power nowhere granted in the Constitution, and directly at variance with some of its provisions, and negatived by all its history, instead of resorting to the right of revolution for its exercise, which might have been sufficient to cover the case, and for which the exigency might have been considered a sufficient warrant, — it was found that "the war power" not only swallowed up all the other powers, and all the guarantees of the Constitution, and the

rights of the States and of the people, but conferred the unlimited power to do whatever the necessity of the case required, — the necessity of the case of course requiring whatever those who held power desired to do. And a pamphlet, which, through "the war power," placed the President and Congress beyond all the restraints of the Constitution, and argued that the law of nations (uncertain and changing as that law is) was above the written Constitution of the United States, not merely in reference to our intercourse with foreign nations, but in regard to the internal affairs of the country, was honored with stereotype editions, circulated by societies, and held by grave doctors of divinity writing upon constitutional law, to be an "exhaustive treatise" upon that subject.

The Constitution of the United States was formed, as you are aware, in 1787; was adopted in 1788; and the government under it was fully organized in 1789.

The period immediately preceding its adoption had been one of great solicitude to many who had been actively engaged in the war for independence, in and out of Congress; and who were aware of the difficulty of conducting the intercourse of the new States with foreign nations, under the limited powers conferred upon Congress by the Articles of confederation, — and the still greater difficulty, perhaps, of reconciling the conflicting interests of the different States in relation to their trade and commerce.

The common feeling of patriotism, arising out of antagonism to the rule of the British government, which had bound them together during the war of the Revolution in which they made a common cause, was fast giving way to the selfish spirit natural to all communities, and which made each State desirous of deriving the greatest benefit from her natural or acquired advantages. And the discontent of those States which found themselves burdened with debts incurred in the common defence of their rights and liberties, without the means of payment from public lands, and without great commercial advantages out of which to create the means of payment, must have been a source of no small anxiety to any one who reflected upon the probable future of the new States.

Jealousies and divisions, regulations and counter-regulations, offences and retaliations, wars, and conquests and oppressions,

were very clearly foreshadowed, unless wise counsels, directed by a merciful Providence, should avert such calamities.

To the credit of New York and Virginia, let it be said that they led the way in a measure for relieving the discontent by cessions of their claims to lands, which were to be held for the common benefit, not however, it must be admitted, until grave complaints had been made by New Jersey, Maryland, and other States, respecting the injustice which would be done if the unsettled lands, which had belonged to the Crown, and which had been wrested from Great Britain by a common expenditure of blood and treasure, should be held by the States within whose limits they lay, according to their charters. But this, perhaps, should not detract from the credit due to them for their respective cessions. No nation or community is to be expected, unasked, or even without a very strong pressure, to surrender its claims to territory. The love of territory may be said to be a national weakness.

The discontent respecting territory being allayed by these and other cessions of public lands, the antagonism of commercial interests still remained, and with this subject that of intercourse with foreign nations was intimately connected. Notwithstanding the provisions of the Articles of confederation, by which no State, without the consent of the United States, should enter into any confidence, agreement, alliance, or treaty, with any king, prince, or State, nor into any treaty, confederation, or alliance, with any other State, without such consent, specifying the purposes and the length of time it should continue, and that no State should lay any imposts or duties which might interfere with any stipulations in any treaties entered into by Congress, it must have been evident that the different States might, by legislation, attempt to attract foreign commerce to their own ports, and also to exclude other States from the natural advantages of navigation within their harbors and rivers.

The difficulties which arose between New York, on the one hand, and New Jersey and Connecticut, on the other, at a much later date, in regard to the exclusive navigation of the waters of the former by boats propelled by fire and steam, — which were peaceably settled by a decision of the Supreme Court under the Constitution, and which could have been settled in no other way, except by the submission of one party, or by force and

violence, — serve as an emphatic commentary upon the wisdom of those who saw the necessity, for certain purposes, of something more than the Articles of confederation, to wit, another government, which should, in its sphere, provide for the welfare of the whole country, instead of leaving that welfare to depend on the selfish interests which might actuate the component parts of the Confederation.

The difficulties respecting regulations of commerce, and a controversy between Virginia and Maryland, concerning the navigation of the Potomac, led the General Assembly of Virginia to appoint commissioners to meet such commissioners as might be appointed by other States, "to take into consideration the trade of the United States; to examine the relative situation and trade of the said States; to consider how far a uniform system in their commercial regulations may be necessary to their common interest and their permanent harmony; and to report to the several States such an act, relative to this great object, as, when unanimously ratified by them, will enable the United States, in Congress assembled, effectually to provide for the same.

Commissioners were appointed from nine States, but none attended from four of those States.

The commissioners who assembled recommended endeavors to procure the concurrence of the States in the appointment of commissioners to "devise such further provisions as shall appear to them necessary to render the Constitution of the Federal government adequate to the exigencies of the Union; and to report such an act for that purpose to the United States in Congress, as, when agreed to by them and afterwards confirmed by the legislatures of every State, will effectually provide for the same."

It may not be amiss to mark here that these proceedings, as you readily perceive, look to additions or amendments to the Articles of confederation, and not, as yet, to the formation of a national government; and as you doubtless are aware, also, that the evils which led to these proceedings, and for which a remedy was sought, related to commerce, navigation, and intercourse with foreign nations, and had no reference to suffrage, or any matter regarding the purely internal affairs of the States. It was not for the regulation of any such matters that a change in the existing condition of things was proposed or desired. It

was, of course, the less probable that any such change should have been made.

But here came grave difficulties. How were powerful States, or even small States, to be induced to give up their natural advantages for the benefit of others less favored?

It was perhaps but natural that Rhode Island, a small State, with a good harbor, easily accessible, and which would have but the smallest representation in any Congress, should prefer to adopt her own measures to secure the commerce which she desired, and for that reason to decline to become a party to a convention, which, in adopting regulations of commerce, might not leave her the benefit of her natural advantages. Undoubtedly there lay behind this consideration the consciousness that her more powerful neighbors, Massachusetts and Connecticut, might, if left at liberty, compel her to comply with their commercial regulations; but so long as the Articles of confederation existed, (and they provided for a perpetual league,) no State could make war upon another State, nor could the Confederation make requirements upon a State to give up any of her rights. Any attempt, therefore, to compel any State to forego her advantages, and conform to the regulations and wishes of any other State, would have been, as matters then stood, an unwarrantable interference with the rights and privileges of such State.

In the convention which followed, there was comparatively little difficulty in agreeing upon the provisions of the Constitution relating to commerce, foreign and domestic, and those which had regard to intercourse with foreign nations.

The antagonism of interests and opinions exhibited itself in the convention mainly upon questions regarding taxation, the raising of revenue, the distribution of political power, and the importation of slaves.

There was an effort made to give the new government power to tax exports, strenuously resisted by the Southern delegations, because, as they alleged, such a measure would bear unequally upon that section.

Another and great source of contention was the rule of taxation. It seemed to be generally supposed that no small portion of the public revenue must be derived from direct taxation, and the question was, by what rule the apportionment of such taxes

should be made among the several States. Connected with this, was the question, upon what basis should the representation in the House of Representatives of the new government be apportioned among the different States. The controversy turned very much upon the question, whether the number of the slaves should be taken into the enumeration of the population of the several States, with reference to these objects, and upon these questions the two great sections, North and South, were at cross purposes, the Southern delegates contending that the slaves ought not to be taken into the account in determining the proportion of taxes to be assessed, but ought to be enumerated in making up the proportion of representatives, and the Northern delegates generally maintaining the converse of both propositions. It resulted in a compromise, by which three fifths of the number of slaves were to be included in the enumeration in each case. That taxation and representation should go together was one of the maxims upon which the Revolution had been founded.

A controversy of a similar character had arisen under the Confederation, in regard to the apportionment of the "quota" to be furnished by the several States for the public service, which was settled in the same way.

It is not inappropriate, perhaps, to remark in passing, that while the slave States had, until the late rebellion, the full benefit of the compromise in relation to the representation, the free States had received very little advantage from it in regard to taxes, almost all the revenues of the government having been derived from other sources than direct taxation.

Another question arose, whether the new government, which was to have the power to regulate commerce, should have the right to prohibit the importation of slaves. This connected itself in some measure with the other questions, as importations increased the number of slaves, and so would give greater rights of representation, as well as subject the States, into which the importations were made, to greater burdens of taxation. The danger of the burden was not considered, however, as forming an objection to the importation, and there was a strenuous effort to insert a provision restraining the power of Congress upon that subject. This resulted in a compromise, by which Congress were restrained from exercising that power prior to 1808, but allowing a tax to be imposed on such importations, not exceeding ten dollars for each person.

There was also inserted the clause by which fugitive slaves were to be delivered up, probably as a part of the same compromise, the resolution in favor of it passing without objection.

The question respecting the right of suffrage in the election of representatives in Congress, and electors of president and vice-president, elicited but little debate, and was quietly disposed of by adopting, in each State, the rule of the State regulating suffrage, whatever that might be.

There was no proposition for the abolition of slavery, nor anything having the remotest reference to the incorporation of any such power into the Constitution. It is perhaps safe to say, judging from the Constitution and the debates, that a proposition of that description would not have commanded the vote of a single State in the Convention.

Slavery existed at that time in all the States except Massachusetts, where it was held to be abolished by a clause in the State Constitution, which was doubtless intended, when incorporated into that instrument, as the expression of a general truth, and not for the purpose of effecting such an abolition. A similar clause in the Bill of Rights of Virginia, and one in New Hampshire, were not held to have any such effect. Connecticut had made provision for its future extinction.

It was not to be expected that these compromises should reconcile all the people to the new government proposed to be instituted, but without any of them it must have failed of commanding the assent of all the States; and if without these compromises it had been adopted by the requisite number, nine States, and had gone into operation as the Constitution of those States, leaving the others to take care of themselves, it would probably have then led to a Southern confederation, with what further result, in a few years, there are no means of forming any reasonable conjecture. It might have been new efforts for a union, through some compromise by which all would have become united under one Constitution. It might have been antagonism, through a conflict of interests, and a sectional war. The sure result of any plan which did not command such an assent as to render further opposition fruitless, would have been a distracted and divided country, neither efficient at home nor respected abroad.

After the formation of the Constitution there were grave doubts respecting its adoption. In several of the States the

majority of the delegates in its favor was quite small. Its great danger was the jealousy which existed in regard to civil liberty and personal security, and in regard to the right of the States to manage their local affairs. This jealousy was manifested nowhere else to the same extent as in New England. But for the fear that the Constitution would be wholly lost, if any conditions were annexed to its acceptance, such conditions being in fact non-acceptance, its adoption in many of the States would have been on condition that certain amendments should be incorporated into it, or in other words it would have been rejected until thus amended. It was only on assurances that several of the most important of these proposed amendments would afterwards be added, that its adoption was secured through strenuous efforts for that purpose, and it was amended, accordingly, immediately after its adoption.

I have sketched this brief history of the causes which led to the formation of the Constitution of the United States, and the circumstances attending its adoption, because the study of its history serves to show how its framers were enabled to agree upon a constitution, to elucidate its provisions, and to exhibit the purposes and limits of the government instituted by it. And the amendments proposed and adopted, mark the care and jealousy with which the people of that day guarded the existence and rights of the States, and the liberties of the citizen, and the reluctance with which they surrendered a portion of those rights and liberties to the care and control of the new government of the nation, although the surrender related principally to matters of national concern.

He who desires to have accurate ideas upon this subject will do well to study carefully the amendments to the Constitution, made immediately after its adoption, in connection with similar provisions in the constitutions of several of the States, and he will be assured that it was not one of its purposes to enable the new government to interfere with the internal concerns of the States, nor to interfere, except in limited instances, with the liberties and privileges of the people under their State constitutions.

The differing views in relation to the adoption of the Constitution, its true character, and the dangers to be apprehended from it, very soon extended to the administration of the gov-

ernment under it. Those who favored it, and sustained the earlier administrations under it, were denominated Federalists; those who opposed the administrations and who were zealous for individual rights and State rights, took the name of Democrats. The former were accused of favoring a strong government. The latter admitted that they were in favor of a strict construction of the powers of the new government, and feared that it would subvert or impair the rights of the States.

Under the administration of John Adams, the opposition became very violent.

Connected with the controversies arising from national politics, and aggravating those controversies in a great degree, was the excitement respecting the French Revolution; and two acts of Congress were passed under his administration, popularly known as the Alien and Sedition Laws. Instead of preventing attacks upon the administration, which was one of the purposes of these acts, they only rendered such attacks more violent and abusive. The constitutional power to pass such acts was denied, and a new impetus was given to the fears that the liberties of the citizens were in danger from the action of the Government of the Union, and this gave rise to the celebrated Virginia and Kentucky resolutions of 1798 and 1799.

These resolutions served for a long time, I think, as a kind of platform for the democratic party; and what has been a much more mischievous consequence, they furnished a tangible basis for the idea upon which Mr. Calhoun attempted, in the first instance, to maintain the doctrine of nullification, and failing of that, afterwards, the doctrine of secession. As an exposition of the constitutional right of the States to interfere, and pronounce upon the constitutionality of the laws of the United States, and provide a remedy against particular acts of unconstitutional legislation, they are unquestionably very vague and uncertain; and it may well be doubted whether the distinguished authors of them had any very clear idea in what way the constitutional remedy which they indicated was to be applied.

The Virginia resolutions, drawn by Mr. Madison, were passed by the Assembly in December, 1798.

They declared, "explicitly and peremptorily," that the Assembly viewed "the powers of the Federal Government, as resulting from the compact to which the States were parties, as limited by the plain

sense and intention of the instrument constituting that compact, and no farther valid than they are authorized by the grants enumerated in that compact; and that in the case of a deliberate, palpable and dangerous exercise of other powers, not granted by the said compact, the States, who are parties thereto, have the right, and are in duty bound, to interpose, for arresting the progress of the evil, and for maintaining within their respective limits the authorities, rights, and liberties, appertaining to them."

The Assembly expressed "its deep regret that a spirit has in sundry instances been manifested by the Federal Government to enlarge its powers by forced constructions of the constitutional charter which defines them; and that indications have appeared of a design to expound certain general phrases, (which having been copied from the very limited grant of powers in the former articles of confederation were the less liable to be misconstrued,) so as to destroy the meaning and effect of the particular enumeration, which necessarily explains and limits the general phrases, and so as to consolidate the States, by degrees, into one sovereignty, the obvious tendency and inevitable result of which would be, to transform the present republican system of the United States into an absolute, or, at best, a mixed monarchy."

The Assembly then particularly *protested* against the palpable and alarming infractions of the Constitution in the two late cases of the "Alien and Sedition Acts," which were denounced as the exercise of powers not delegated by the Constitution.

And in conclusion the Assembly, expressing "the most sincere affection for their brethren of the other States; the truest anxiety for establishing and perpetuating the Union of all; and the most scrupulous fidelity to that Constitution, which is the pledge of mutual friendship, and the instrument of mutual happiness," solemnly appealed "to the like dispositions in the other States, in the confidence that they will unite with this commonwealth in declaring, as it does hereby declare, that the acts aforesaid are unconstitutional; and that the necessary measures will be taken by each, for coöperating with this State, in maintaining unimpaired the authorities, rights, and liberties, reserved to the States respectively, or to the people."

With the exception of the assertion of the right and duty of the States to interpose for the purpose of arresting the progress of the evil, and for maintaining, within their respective limits, the authorities, rights, and liberties, appertaining to them, there is nothing unconstitutional or revolutionary in these resolutions. And as this is asserted only in case of a deliberate, palpable and

dangerous exercise of powers not granted, although there is no warrant in the Constitution for such interference by the States, it may not be regarded as a very obnoxious assertion of the right of revolution, under such circumstances, were it not that the right of revolution is a personal, and not a State, right.

The resolutions were accompanied by an address to the people, containing warnings against usurped power, which may have a significance beyond the period of the address itself. They propose no action of a revolutionary character. Copies were transmitted to the other States, several of which responded, in some instances very curtly denouncing this attempt at interference as unconstitutional; and some of them approved and defended the obnoxious acts.

On the reception of these responses, the subject came again before the Assembly of Virginia, and Mr. Madison made a most elaborate report on the subject, concluding with a resolution reaffirming the previous action of the Assembly.

The original draft of the Kentucky resolutions of 1798, was by Mr. Jefferson. The first resolution declares that the several States

"are not united on the principle of unlimited submission to their general government, but that by compact they constituted a general government for special purposes; delegated to that government certain definite powers, reserving, each State to itself, the residuary mass of right to their own self-government; that whensoever the general government assumes undelegated powers, its acts are unauthoritative, void, and of no force; that to this compact each State acceded as a State, and is an integral party; that this government, created by this compact, was not made the exclusive or final judge of the extent of the powers delegated to itself"; . . . . "but that, as in all other cases of compact among parties having no common judge, each party has an equal right to judge for itself, as well of infraction as of the measure and mode of redress."

In 1799, taking into consideration the answers of the other States to the resolutions of 1798, the Assembly of Kentucky resolved, among other things, —

"that this Commonwealth considers the Federal Union, upon the terms and for the purposes specified in the late compact, conducive to the liberty and happiness of the several States; that it does now unequivocally declare its attachment to the Union, and to that compact, agree-

ably to its obvious and real intention, and will be among the last to seek its dissolution; that if those who administer the general government be permitted to transgress the limits fixed by that compact, by a total disregard to the special delegations of power therein contained, an annihilation of the State governments, and the creation, upon their ruins, of a general consolidated government, will be the inevitable consequence; that the principle and construction, contended for by sundry of the State legislatures, that the general government is the exclusive judge of the extent of the powers delegated to it, stop not short of despotism, — since the discretion of those who administer the government, and not the Constitution, would be the measure of their powers; that the several States who formed that instrument, being sovereign and independent, have the unquestionable right to judge of the infraction; and that nullification, by those sovereignties, of all unauthorized acts done under color of that instrument, is the rightful remedy."

The assertion in these resolutions that the Constitution was a compact between the several States, and that nullification by the States of unauthorized acts of the United States was the rightful remedy, was of most mischievous tendency; and bitter has been the fruit of the seeds thus sown. But in other respects they contain some important truths, which may well be pondered at the present time.

The embargo of 1807 bore very heavily on the interests of New England, and its constitutionality was denied, but there was no assertion of a right to stop its operation by State authority. Its constitutionality was tested in the Circuit Court of the United States, and the decision in its favor was acquiesced in.

The next assertion of the right of the States to interpose, because the United States government had exceeded its powers, comes undoubtedly very much in the shape of a threat of disunion, not from any State, but from one of the representatives of a State, on the floor of Congress. It was at the session of 1810–11, in a debate on a bill for the admission of Louisiana into the Union, that Mr. Quincy said, —

"I am compelled to declare it as my deliberate opinion, that if this bill passes, the bonds of this Union are virtually dissolved; that the States which compose it are free from their moral obligations, and that as it will be the right of all, so it will be the duty of some, to prepare definitely for a separation, — amicably if they can, violently if they must."

The preparation, however, was not made.

The war of 1812, which also affected the interests of New England adversely, led to great party excitements. The denial, by the Governor of Massachusetts, of the right of the United States to order the militia of a State on duty out of the State, and the refusal to place the militia under the officers of the United States, brought that State very nearly into collision with the authority of the United States. The same was true of Connecticut also. And these and other sources of complaint led to the Hartford Convention. There is nothing in the resolutions of that convention which asserts a right of nullification, nor that advocates disunion; but assembling, as it did, in time of war, and at a gloomy period of that war, and holding its sessions in secret, it was regarded with grave distrust, and undoubtedly gave great uneasiness to the administration of Mr. Madison. Peace came just at the close of its deliberations.

The peace of 1815 brought a cessation of party conflicts, as it is devoutly to be hoped peace may do again.

Mr. Calhoun was the leader in introducing the protective tariff, in 1816; but the experience of a few years made a tariff for protection a subject of controversy. From the very constitution of society the protected products increased much more at the North than at the South. The tariff was thereupon denounced as unconstitutional, and on a failure to procure a repeal of the protective duties, Mr. Calhoun and his followers asserted the right of the States to nullify the acts of Congress, as a peaceful remedy against unconstitutional legislation.

It is a matter of curious history to note the changes of this period, and trace them, so far as we may, to their causes in the personal ambition of prominent politicians; but this is foreign to my purpose at this time.

From the defeat of the attempt by South Carolina to nullify the tariff laws, in 1832, the political controversies assumed more and more of a sectional character, as most of you must be aware. There were divers causes of discontent on both sides.

The hostility at the North to slavery, because of its immorality and injustice, and the large representation in Congress founded upon it, was increased and intensified by the haughty and dominant tone of the slave-holding interest, and especially by the indignity offered to a most worthy citizen and learned jurist of Massachusetts, who was appointed an agent of the State

to reside in South Carolina, for the purpose of testing by suit, in the courts of the United States, the constitutionality of certain police regulations, under which colored seamen from the free States were subjected to imprisonment during the stay of their vessels in the port of Charleston; — and who was compelled to leave that State with threats against his life, the State authorities being, if not in complicity, at least powerless to protect him.

Attempts to extend slavery into the territories, first by Congressional legislation, and then by judicial decision in defiance of Congressional legislation, and the high-handed measures for the introduction of slavery into Kansas, in order to secure another State in the Southern interest, raised the excitement to a pitch which rendered many in the North ready for a collision.

Personal liberty laws were but the legitimate or illegitimate fruit of all these things.[1]

Secession, as a "peaceful remedy" for alleged infractions of constitutional right, came next, and that brought war.

For years previous, the parties, so far as the division was North and South, had disagreed in relation to the true character of the Constitution. Mr. Calhoun, following the language of the Virginia and Kentucky resolutions, insisted, that it was a compact, to which the States were parties, — that a violation of it released them from its obligations, — that there being no common arbiter to determine in relation to infractions of it, each State must judge for itself whether the compact was broken, and what ought to be the remedy, and might for that reason secede, whenever it should determine that the violation of it required that remedy.

On the other hand it was contended, Mr. Webster being for years the leader in the debates in Congress upon the subject, that the Constitution was an organic law, adopted by the whole people, that its obligation was like that of the State Constitutions, and perpetual; and that there was no right on the part of any State, either to nullify the laws of Congress, or to separate itself from the Union.

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[1] In 1855 Massachusetts was a strenuous advocate for "State rights," particularly the right of *trial by jury*, and the privilege and benefit of the writ of *habeas corpus*. See Appendix, Note C.

If the first of these positions were the true view, secession was lawful, and the remaining States had no cause of complaint. If the latter, then the hostilities which followed the acts of secession, on the part of the seceders, were undeniably acts of treason, and punishable as such.

Let it be impressed upon our memories, that the leading principle of those who denied the right of the States to interpose, to nullify, to secede, has been, from the first, that the Constitution was an organic fundamental law, of perpetual obligation, and not a compact; that there was no right in any State or States, or in the people of any State or States, to refuse obedience to its authority, exercised within constitutional limits, (of which the judiciary were to judge,) or to nullify its provisions, or the laws made under it, or to escape from the bonds of the Union in any other mode than by a successful revolution, and that all attempts so to do were treasonable, and all acts passed for such purposes were void.

The government, immediately upon the inauguration of Mr. Lincoln, placed itself upon this ground, which had long been the doctrine generally of the party which elected him. And it was upon this principle that the United States entered upon the war, to which they were forced by the attempt at secession.

It was for the purpose of suppressing a rebellion, and not for the purpose of fighting a foreign foe, that the armies were marshalled for the conflict.

So was the resolution of Congress, most explicit in its terms, "that this war is not waged on their part in any spirit of oppression, or for any purpose of conquest or of subjugation, or purpose of overthrowing or interfering with the rights or established institutions of those States, but to defend and maintain the supremacy of the Constitution, and to preserve the Union, with all the dignity, equality, and rights, of the several States unimpaired; and that as soon as these objects are accomplished, the war ought to cease."

It was upon this ground that troops were called for, and men volunteered, and perilled their lives, and gave themselves to death upon the battle-field.

The war, on the part of the United States, was not only begun upon the ground that the resistance to the authority of

the United States was treasonable; that it was an insurrection, a rebellion, and that all engaged in it were liable to be punished as traitors; it was prosecuted upon this ground throughout.

It was upon this ground, and could only be upon the ground that the United States were attempting to suppress a rebellion, that so much dissatisfaction was justly expressed at the premature recognition of the Confederates as belligerents, by Great Britain and France. If both parties had belligerent rights of precisely the same character as those existing in a foreign war, the right of conquest included, we had no cause of complaint that Great Britain and France recognized that fact, and we could not have had a right of conquest unless the other party to the war had belligerent rights.

It was upon the ground that we were attempting to suppress a rebellion, that prosecutions for treason were instituted, and that property was confiscated.

It was upon this ground that the final victory was achieved.

And it is upon this ground that Jefferson Davis, and men of lesser note, are at this moment held as prisoners for trial, and liable to suffer the penalties of the law for the punishment of treason.

The war must be held to have rendered the judgment of arms against the doctrine of the Virginia and Kentucky resolutions, that this is a compact of States, and that States may interpose and nullify the laws of the United States, or may secede from the United States; but having thus rejected the doctrine that a State may nullify or secede, and maintained that the acts of secession are unlawful and void, and so not the acts of the State, but the unlawful acts of persons who are liable for their offences, we are not at liberty to turn round and say that these void acts, which no State could pass, did notwithstanding change the relations of the State to the United States, so that the war was in all respects like a foreign war, and that the suppression of the rebellion was the conquest of the States.

Let me say again, as I have said upon another occasion, if the State had no right to pass the act of secession, it was not the act of the State. It was the act of persons assuming the authority of the State. One of the United States, as a State,

cannot sever itself from the United States but by revolution. That is settled so far as it can be settled. Then the act by which it was attempted to make the severance is not the act of the State, because the State acts only through persons authorized by it, and it could give no authority for such an act. The persons who passed the act of secession could do no act, as the act of the State, which the State could not, and did not, authorize them to do.

It is astonishing what a deal of flummery has been spoken and written on this subject.

Take for instance a pamphlet recently published, by a writer on criminal law, from which the following are extracts: —

"It has been assumed, even by men who are not Cursers of Ham, that, since the States seceding had no power to withdraw from the Union, therefore their several acts of secession were, in law, nullities; leaving the States to stand, toward the general government, in the same legal situation as if the acts had not been passed.

"Let it, then, be stated, that this proposition has no foundation either in the law of the case or in the facts of the case. It is sustained by no decision of any court, by no *dictum* of any judge, by no observation of any writer on constitutional law; it rests only in mere loose assertion, made, since this rebellion broke out, by persons who, whatever might have been their capacity to form a correct opinion, had given to the question no adequate investigation. The phrase, '*The act of secession is a nullity*,' is, in most instances, practically employed for one or the other of two opposite purposes: either, to convey the idea that the utterer of it is intensely loyal; or, on the other hand, to impress on the hearer's mind the falsehood, that no evil consequences can lawfully be made to fall upon the participators in secession, since the act of seceding is a null act.

"Looking at this question as one of fact, we all know — every boy in the land knows, it is known even to the most ignorant peasant in Europe — that the proposition which asserts the act of secession to be a nullity is false. I say, everybody knows that secession was *not a nullity in fact*. Upon the act of secession, the State which had passed it, ceased to have a governor, judges, legislators, and other State officers, performing their several official functions under the recognized binding obligation of an oath to support the Constitution of the United States.

"Is, then, the relation of the seceded States to the United States one thing in fact, and directly the opposite thing in law? These

States are, as they always were, bound by law to render allegiance to the United States; *it is a fact of the law* that they are so bound. Do they, therefore, *render allegiance in law?* If yea, why is this war? If their relations are not changed in law, what has the law to complain of? And, pray tell, have we the right to fight a State, or a man, whose *conduct in fact* has wrought no change in *his relation to us in law?*

"If it be true that secession has wrought no change in legal relations between the seceded States and the United States, then the United States has no legal right to complain of it. Complaint might, indeed, be made of such action of the people as capturing forts, marching armies against us, and the like, but *not of the act of secession.* And it is a general proposition, — a proposition to which, so far as I know or believe, there is no exception, — that *no man has any legal right to complain of any act which does not change the legal relation between himself and the doer of the act.* From this proposition comes another, or rather, the other is the same proposition as this, put in a different shape, and applied to the particular subject of our present discussion, namely, — *If secession has not changed the legal relation of the seceded States to the United States, then, as the United States has no legal right to complain, so these States had the legal right to secede.*

"But, in truth, the act of secession did work as great a change in law as it did in fact. If it wrought no other change, it placed the seceded States in the place of delinquents from duty, and placed the United States under obligation to come down upon them with all its power, military and civil. It annulled all those civil rights which they derived under the Constitution, and which pertain to the ordinary condition of peace; because such is the effect of war; and that the United States is now constitutionally carrying on against them, war in its full sense, with its full consequences, we have already seen to have been adjudged by the Supreme Court."

It would be amusing, if it were not painful, to witness the utter confusion of principles exhibited in these extracts.

A State, in its character of a political body or existence, having as such, rights, powers, and duties, which it can enforce, exercise, and perform only through the agency of persons, who being duly authorized may, in reference to such rights and powers and duties, represent, and act for, and bind the political body or existence called the State, is one thing; and persons, who, in relation to matters over which the State has no power, do not, and cannot represent the

State, and so do not, and cannot bind the State, but who, by unlawfully attempting to represent the State, may and do render themselves liable for their own acts, is another and a very different thing. The distinction is palpable, but it is completely ignored by this writer, and by others who ought to know better, as if no such distinction ever existed. And yet this distinction is derived from a familiar principle of the law of agency, perfectly applicable, by analogy, to this case.

How often do we hear a State likened to a corporation in reference to the acts which it may do, and the instrumentalities which it may employ. How much oftener, even, do we hear the members of the legislature, and other officers spoken of as agents of the State. It is true, that the States are not strictly corporations, and that the relation between the State and its officers is not technically one of agency. But it is nevertheless true, that the principles to which I have alluded apply. A party cannot authorize his agent to do what he himself has no power to do, and no person can justify, under the authority of another, for any act which that other could not empower him to do.

So a State cannot confer power on an agent to do what the State itself has no right to do, whether the agent has a legislative character, or is a special agent; and any person assuming to act under the authority of a State, in a case where the State has no right, does not represent the State, nor bind the State, and cannot justify under the State.

Again, this author says the States are bound by law to render allegiance to the United States. This is arrant nonsense. Allegiance is due from the subject to the monarch, from the citizen to the Government, and it is common to require parties to take an oath of allegiance. The citizen swears that he will bear faith and true allegiance to the State, and he swears that he will support the Constitution of the United States. The violation of the ligeance incurs, or may incur, the penalty of treason. It is personal entirely. A State neither owes allegiance, nor can commit treason.

Again, he says, everybody knows that secession was not a nullity in fact, and so he reasons that it was not a nullity in law.

If by the first part of the proposition, he means that by the

acts of individuals, assuming to act for the States, the States were disorganized, so that they no longer performed their proper functions in the Union, then no doubt secession was not a nullity in fact, but even with that meaning, the conclusion that it was not a nullity in law, would be a very complete *non sequitur*. If the acts were unlawful, then there was no legal secession, and secession in law is legal secession.

If by nullity in fact, it is meant that in fact there was secession, the proposition is not true; the war, as we have seen, has disproved it. There was no secession. The attempt failed. There was rebellion, and usurpation, and war, but not secession.

Again, in one of the paragraphs above quoted, the writer asserts that if secession has wrought no change in the legal relation between the seceded States and the United States, the United States have no right to complain; and he enunciates the proposition, as without exception, "that no man has any legal right to complain of any act which does not change the legal relation between himself and the doer of the act." And he then says, "if secession has not changed the legal relation of the seceded States to the United States, then as the United States has no legal right to complain, so these States had the legal right to secede."

This is law and logic both run mad. My tenant subverts the soil in certain places, contrary to his right, and he cuts down shade-trees and commits other waste; but the legal relations between us are not changed by these wrongful acts. The legal relations were those of landlord and tenant. He is my tenant still. I may have an action against him, appropriate to such a state of facts, because he has acted in violation of the rights derived from the legal relations which subsist between us. But if I bring the action, it does not dissolve the legal relations. If he should do another similar act, I might have another action, for the reason that the relations still subsist. But the logic of this writer would prove that if the relations subsist, the act is justifiable.

I appoint an agent to receive certain property in trust, and deliver it over to me. The agent accepts the trust, receives the property, and appropriates it to his own use. The legal relations between us are not changed. He is my agent still, and

therefore on the reasoning of this writer I have no right to complain, and the act is justifiable. That seems to be the logic.

But it will be said that by the conversion he becomes a wrongdoer, and so changes the relations between us. True he stands in the relation of a wrongdoer to me. That however is not his legal, but his illegal, relation to me. His act does not even change my legal relations to the property, which I may take, if I can lay my hand on it.

And so the secessionists, by wrongfully converting the State offices to their own use, and claiming to act under State authority, did not change the legal relations between themselves and the United States, or between the State and the United States, but by these acts assumed relations which being wrongful and illegal have no operation upon the legal relations before subsisting. How far they are legally responsible to their own States, for their usurpation, as well as to the United States for their treason, we need not discuss. It may be that the usurpation of the State authority existed only in relation to the United States, being only in opposition to, and in violation of their duty to the United States.

Again, this writer says, the act of secession, "if it wrought no other change, placed the seceded States in the position of delinquents from duty, and placed the United States under the obligation to come down upon them with all its power, military and civil. It annulled all those civil rights which they derived under the Constitution, and which pertain to the ordinary condition of peace, because such is the effect of war."

The delinquency from duty, so far as *State action* is concerned, was in not sending senators and representatives to Congress, which may perhaps be quite as truly regarded as an omission to exercise a privilege or a right. Certainly there is no State delinquency in that, or in any other act or omission, lawfully authorized by the State, so as to become a State act, which required the United States to "come down" upon the State itself. It is quite sufficient, for all the purposes of the United States, to come down, effectually, upon the Rebels, who by their usurpation and treason caused the delinquency, and who could not annul all the civil rights of the State derived under the Constitution.

So far from its being true, that all the civil rights of the State

were annulled by the secession, the same writer but a few pages farther on contends that the United States is bound to execute the guaranty of a republican form of government to the seceded States. Now if such *duty* exists on the part of the United States, then there is a *corresponding right* on the part of the seceding States to have that duty performed, and so there is one civil right, at least, derived to the States under the Constitution, and which pertains to the ordinary condition of peace, which, on his own showing, is still a subsisting right. — But further; this admission that the United States are bound to the performance of that duty, overthrows the whole argument of the writer on this subject. If the United States are bound by that guaranty, it is because the States are still in the Union, as States, and so secession is a nullity in law and in fact; and there is no need of readmission. There is no such guaranty to territories, and more especially to countries or States which have been conquered. It is perfectly absurd to say that the States are out of the Union, or have become territories, or have been conquered, in any sense which implies that they are not existing States in the Union, under the Constitution, and at the same time to attempt to maintain that it is the duty of the United States to guarantee to them a republican form of government, under this clause of the Constitution, which applies to States in the Union, and no other. This writer is not the only party who has been guilty of the inconsistency of contending, that the seceding States are not in the Union, and in the next breath asserting the duty of the United States to guarantee to them republican forms of government, as States.

But it may be urged that the entire people united in this attempt to secede, and that the people constitute the State; that we cannot separate the people from the State which they constitute.

In some connections, and for some purposes, this is undoubtedly true.

> "What constitutes a State?
> Not high-raised battlement or labor'd mound,
> Thick wall or moated gate;
> Not cities proud, with spires and turrets crown'd;
> Not bays and broad-arm'd ports,
> Where, laughing at the storm, rich navies ride;
> Not starr'd and spangled courts,

Where low-brow'd baseness wafts perfume to pride,
No: MEN, high-minded men,
With powers as far above dull brutes endued,
In forest, brake, or den,
As beasts excel cold rocks and brambles rude;
Men, who their duties know,
But know their rights, and knowing, dare maintain,
Prevent the long-aim'd blow,
And crush the tyrant, while they rend the chain:
These constitute a State."

Will those who maintain the doctrine that the *States* seceded, in fact and in law, and that they thereby lost their *status* as States, and have been conquered, because the people passed acts of secession and have been defeated, accept this definition, according to which the people constitute the State?

Some zealous persons argue that it is preposterous to attempt to distinguish between the State and the people of the State. But the distinction is plain, and must be made in relation to this and other subjects.

The signification of language oftentimes depends upon the subject-matter to which it is applied. The same terms mean different things in different connections.

If we say that a State defended itself gallantly, we speak of the acts of the persons who were active in its defence. And so when we say that a State is proud, haughty, self-sufficient, vainglorious, violates its obligations, &c., we refer to the disposition, temper, vanity, and acts, of the people of the State.

But if we are discussing the legal rights of a State, the term has a different interpretation affixed to it. If we say that a State owns a certain tract of land, we mean that the title is in the political organized existence called a State. All the persons in the State, put together, do not, as persons, own that land. If we say that the State has a right to send senators and representatives to Congress, we mean that this organized political existence has that right. All the people of the State, collected in one vast primary meeting, could not constitutionally exercise it, even by a unanimous vote.

And so when we say a State cannot secede, and has not seceded, it is meant that this political existence, organized under its own constitution, and bound to its place in the Union by the Constitution of the United States, has not broken that bond, so

as to get out of the Union, and cannot break it by any act of secession. All its people assembled together could not, by their unanimous act, take this political existence out of the Union, except by successful revolution; and if so, they cannot call a convention, and authorize that convention to do it.

If a pestilence should sweep from the face of the earth every man, woman, and child in a State, the Union would not be dissolved thereby, nor the State dissevered from it. The laws of the United States would still be in force there, as within the limits of a State. Emigration might supply a new population, the custom-houses be reënforced, new officers appointed, the existing laws of the United States executed, and the State be reorganized (not reconstructed) under its constitution, and resume all its functions as a State in the Union without any enabling act, or any new admission.

There is no provision for calling a first meeting in such a state of things. It would be *casus omissus*. But whether by presidential proclamation, or in what other way, the first step being taken, and officers elected, all else would follow of course.

Let us take another view of this subject. It is a very clear proposition, that in this rebellion by the people of the South, there is no change of the Constitution. Those who were in duty bound to support the Constitution before the rebellion, if they are in existence, are bound to support it still. The duty of allegiance remains as it was before the war. Any new outbreak against the government, in the disorganized States, would be treason, in the same manner that it was treason in the commencement of the war. And this may serve to show that there has been no change in the legal relations of these people to the United States, and no conquest of territory; for the inhabitants of a conquered territory, until they owe allegiance to the conqueror, whatever other offence they may commit, do not commit treason.

The judges of the United States may at any moment resume their functions in those States, without the passage of any law whatever to enable them to perform their duties there. The times and places for holding their courts in the States of South Carolina and Georgia, &c., &c., were prescribed by laws of the United States before the rebellion. Those laws have not been abrogated by the force which has prevented the sessions from

being regularly held. The loss of several sessions, even for years, has not subverted the authority; and the judges may, if they will, without any enabling act of Congress, or any authority from the President, take their seats at any time and place heretofore assigned by law, and hold their courts. Nothing was necessary in order to enable them to do this, except the removal of the military rule which remained on the termination of the war; nor was that even essential, if the military authority did not see fit to interfere with the judicial functions.

There can be no question in relation to this authority of the courts of the United States to act forthwith in their several circuits, for that authority is in no way dependent on the State organization. The judicial authority of the United States acts directly upon the people, through the Constitution and laws of the United States. It is to be exercised within the limits of the States. But the active exercise of the functions of the States, as such, is not necessary to the exercise of the jurisdiction. The State must exist as a member of the Union in order to its exercise. If the State were to cease to be a member of the Union, the judicial authority of the United States courts would cease there. If by any change the State assumed a territorial character, then there should be provision for territorial courts. If the territory of the State was conquered, in such sense that its relations to the United States were changed thereby, then new legislation must be had before the courts of the United States could exercise authority there.

In order that the people of a State may participate in the legislative functions of the United States, it is necessary that the State should be organized. Disorganization which may result from war suspends such participation, because it is only through organization and the exercise of State authority, that senators can be elected by the legislature, and representatives chosen by the people.

But, I repeat, State organization, and the exercise of State authority, are in no way necessary in order to the full operation of the judicial authority of the United States within a State.

Moreover, the judicial right to act has been complete, within all the States, during the whole period of the war. The authority has been obstructed in its exercise, but it was not thereby lost or impaired. The obstructions are removed. What rea-

sons of policy, if any, may intervene to delay the holding of courts in the disorganized States, do not at this moment distinctly appear.

Now the fact that the judicial power has been, and now is, legally in full force in the seceded States, (if we please so to designate those which are not seceded States,) conclusively proves that the States have not lost their existence as members of the Union, either by rebellion, or State suicide, or conquest, or by any other process. And this shows that the *States* have not been in rebellion, as has been said. We speak of the rebel States, because the State authority appears to be arrayed against the Union; but the fact that the judiciary of the United States has at this moment full right and lawful authority to exercise its jurisdiction throughout the States in question, under laws passed before the acts of secession, and that such right, although obstructed, has existed during the whole of the war, shows that the rebellion was personal, and the offence that of individuals, not of States.

Again: the legislative authority of Congress extends over those States in the same manner that it did before the rebellion, and it has done so all the time, although, like the judicial, obstructed in its actual exercise by the force opposed to it.

The continued organization of the State is in no way requisite to the existence of the authority of Congress over it, and the people within it. If it were so, then Congress lost all authority by the success of the war, which left the States completely disorganized. There has been no time during the rebellion that Congress could not have passed any law, to have force and effect within any of these States, as States, which Congress could lawfully have passed prior to the rebellion. And any law so passed, although its actual operation might have been obstructed and defeated for years by force, would stand good, and might be acted on the moment the force was removed, unless it was one which affected some act to be done by the State. If the two houses of Congress should simply admit, as members of their respective bodies, the persons who have been elected as members, in the newly-organized States, no readmission of the States would be necessary. And no legislation is necessary to extend the laws of the United States over those States, whether such persons are admitted or not.

Again: the executive authority of the United States extends over those States, and has done so during the whole of the rebellion, impeded, obstructed, defeated, doubtless, in its actual exercise, for a time, but remaining legally operative, and needing only that the obstruction should be removed.

No act of Congress to enable the President to act again there has been found necessary. Postmasters are appointed, not by virtue of military authority, but by virtue of the laws of Congress which existed before the rebellion, and continued in force notwithstanding the rebellion. And other officers may be appointed, and other executive acts performed there, in like manner.

Now, the proposition that we may make a conquest of territory over which the Constitution and laws of the United States existed before the conquest, at the time of the conquest, and after the conquest, by the force of their passage before the war which gives rise to the conquest, — territory over which the legislative, executive and judicial authority of the United States was complete during all the time of the war; territory over which the United States might, at any moment during the war, exercise every right which they could lawfully exercise, by the Constitution, before the war or after the war, except upon the ground of revolution, — is a proposition that cannot stand in any well-reasoned view of the relations of the States to the United States before and since the termination of the war.

To-day the legislative, executive and judicial authority of the United States over those States, and the people of those States, under and by virtue of the Constitution of the United States, is as perfect and complete as the authority of the Constitution can make it. To-day there is no actual obstruction to the exercise of that authority in either of its branches. Is it not perfectly evident that this is all that the United States can ask, under the Constitution, except it be the performance of the duty resting upon the people of those States to participate in the legislation of the Union, by sending senators and representatives, and the duty of reorganizing the States, and providing, through that organization, for the welfare and happiness of the people, and the performance of all their duties as States in the Union. To all this there is no obstruction, except the difficulty

of taking the first step, and in most instances this step has been already taken.

As I have already indicated, in order to enable the States themselves to resume their functions, some new action, not prescribed, was to be taken at the close of the war, because the rebels, having usurped the State authority, and the usurpers having been overthrown, the States were left without a State administration; a case, which, not having been contemplated, was not provided for. It was only necessary, however, for this purpose, that some provision should be made for holding the primary meetings provided for in the several constitutions, and the rest follows of course, under the State laws.

The authority of the United States being complete, there is no legal impediment to the punishment of traitors. How far the constitutional provision securing trial by jury, which has heretofore been regarded as one of the greatest safeguards of liberty, may interpose an obstruction to convictions, in particular instances, through the refusal of juries to find the fact of treason, does not yet appear. However great it may be, it will not be wise to substitute a military despotism in its stead. It may yet be found useful for the protection of some of those who now seem to prefer military commissions.

But it is said, "Shall rebels be permitted to come back, and organize the State governments, and oppose the United States? They are as bitter rebels as ever."

"Traitors have no rights, except the right to be hanged," may do for a popular war-cry, but it will not bear examination, as a matter of constitutional law. Even treason does not disfranchise a man, except as he is punished for it, on conviction; and the accused has a right to be tried.

Who ever expected that the suppression of the rebellion by force, would operate, in a day, as the miraculous conversion of the rebels to a sound political faith? It would be a more marvellous conversion than the world ever witnessed. The Constitution does not search a man's heart, to determine whether he may vote. It operates, perhaps, upon his conscience, by requiring him to take an oath, if he is elected to an office. Even here, it asks not bonds or sureties.

Shall we punish all the traitors, or shall we follow the more recent examples of the civilized world, and punishing some,

remit the rest to the performance of their former duties, hoping that they will be all the better citizens for the bitter experience of the calamities which they have brought upon themselves and others.

But it is asked again, — "Shall those rebels be permitted to come back into the Union after they have shed so much of the best blood of the country?" That question it is readily seen does not, and cannot, arise, as a question of constitutional law. Whether it is designed to invoke vengeance for acts which were wholly unjustifiable, and which in some instances were undoubtedly horrible atrocities, for which those who committed them deserve the full penalty of the law; or whether it is introduced to sustain revolutionary measures; it has no place in a constitutional discussion. We mourn our honored dead. We shall not recall them to life again by taking vengeance on those through whose agency they have been slain, nor by a sacrifice of the Constitution.

But it is said, that we must have a guaranty, that no similar rebellion against the authority of the United States, shall ever occur hereafter. The folly of such a position needs no exponent. No such guaranty can possibly be given. Place the heel of military despotism upon the necks of the people of those States, and you have only the greater probability that they will eventually attempt to cast off the oppression. Exterminate the Southern people, and fill their places with Yankees, — emigrants from Massachusetts, if you please, — and you have only made assurance doubly sure, that if they deem themselves oppressed, you will have another rebellion, founded perhaps in a better reason than the last, and so much the more likely to be successful.

If you intend to guard against rebellion, in future, punish the leaders, so far as justice and policy dictate, and pardon the followers. Diffuse, as far as you may, just principles, and promote the prosperity even of rebels, no longer such, by all rightful measures.

Another consideration to be noted here is, that you cannot require any such guaranty, or force upon the States or the people any measures to secure it, except by revolutionary action.

To have the full exercise of all the powers of the United

States, legislative, executive and judicial, within these States, and to have the States providing within their sphere for the welfare of their people, and complying with the requirements of the Constitution, is not only all that the United States can require, but all that they can have under the Constitution. All beyond this is revolutionary. We have the power, and may say what we will have in the way of revolution. But if we want revolution, let us say that we intend revolution, and not, by attempting to shield our unauthorized measures under the pretence of constitutional authority, destroy the vitality of the Constitution, making it the instrument to serve the purpose of any party in power, by forced or sophistical construction; for in that way it will become an engine of despotism, instead of the sheet-anchor of freedom.

The proclamation of emancipation was glorified as the constitutional charter of freedom to the slaves, — duly issued by constitutional authority, under the war power. Elaborate speeches of politicians, and more elaborate essays and sermons of reverend doctors of divinity, proved, as they thought, beyond all question, the constitutional right of the President to issue it; the main authority relied upon in the argument, being an ill-considered, general remark of John Quincy Adams, in a heated debate, that "by the laws of war, an invaded country has all its laws and municipal regulations swept by the board," and that "when a country is invaded, and two hostile armies are met in martial array, the commanders of both armies have power to emancipate all the slaves in the invaded territory"; — the logical conclusion being, in the application of this remark of Mr. Adams, that President Lincoln, in the presidential chair at Washington, with his cabinet around him, could, after consulting "Whiting's War Powers of Congress and of the President," free all the slaves in the rebellious districts — by a proclamation!!! Two South American pronunciamentos have, I think, been cited, as having settled that the power existed *under the law of nations*. Indeed! It is very clear that they never settled anything else, on the subject of international law. Painting gave us the President and Cabinet in council upon the proclamation. The engraver's art is to multiply the copies, and give immortality to "the war powers." Jubilee meetings still

celebrate its anniversary. And now, the Chairman of the Committee of ways and means, the leader of the dominant party in the House of Representatives, tells us, that "*no thoughtful man has pretended that Lincoln's Proclamation, so noble in sentiment, liberated a single slave.*"

It is impossible that the Constitution should not receive detriment with such handling.

The President, as a condition of the removal of military rule, has required the States to abolish slavery, and they have done it. It is effective, because in any legal controversy, involving the freedom of the slave, the courts cannot go behind these amendments to the State constitutions, and inquire whether the people were, or were not, coerced into their adoption. For all legal purposes, the act of the people, in voting for these amendments, must be deemed and taken to be their voluntary act. But aside from legal investigations, we know well enough, in point of fact, that the people of these States were compelled to abolish slavery, as a condition of their being permitted to reorganize their State governments. And this is revolution, thus far. The authorities of the United States compelled the surrender of what has been known as a State power and a State right, since the Declaration of Independence, — for more than half a century an acknowledged State right.

The same frank leader in the House of Representatives says of this requirement of the President, "*That* is the command of a conqueror. *That* is Reconstruction, not Restoration. Reconstruction too," he adds, "by assuming the powers of Congress." But the powers of Congress, and the measures of Congress, which he advocates, are equally the powers of a conqueror, and measures of reconstruction.

Let me not be understood to say, that under the circumstances of the case, some measures of revolution were not justifiable. What I contend for is that all such measures should be baptized in their own proper name, and stand on their own merits, as such, and that the Constitution should not be perverted, by being made to cover all the measures to which a dominant party sees fit to resort, even to accomplish a good deed, still less those which are adopted to secure a party ascendency.

The adoption of the amendment to the Constitution of the United States abolishing slavery, extinguished it where it still remained, without revolution.

But here again we have the fact, that some three to four millions of persons, lately slaves, are now free. It is alleged that the United States, having thus enforced their freedom, are now bound to provide for their welfare; that this includes protection against their former masters, the right to testify in the courts, to sit on juries, the right of suffrage, &c.

I have nothing to say against the emancipation itself, whether as a measure of revolution or otherwise, except that the gift of freedom to millions of persons before in servitude, has proved, and will still prove, a most fatal gift to great numbers of its recipients. I could have been better satisfied, if the boon could have been bestowed in a mode somewhat less deadly.

But if, having effected the greater portion of the emancipation by a measure of revolution, it is necessary to carry our revolutionary measures still further, let us meet the exigency fairly, and say that having through revolution subverted the rights of the States to hold slaves and regulate slavery, we have thereby incurred a duty which makes it necessary for us, by another revolutionary measure, to subvert certain other rights of the States to regulate the political rights of freemen, in matters which concern their relations to the States; and then we shall have the case stated in its true aspect, and can judge of it accordingly.

Certain it is that the right of suffrage, the right to be heard as a witness in the courts of justice, the right or the duty to sit as a juror, &c., &c., have been from the first, and are still, matters of State regulation.

Those who abandon the theory of conquest and suicide and loss of State rights, consequent upon the rebellion, admit the last, as well as the first part of this proposition.

But there seems to be a great reluctance to say "Revolution," and so the Constitution is subjected to a new process of construction, and a new discovery is made.

The Constitution, article 4th, section 4th, contains this provision, to wit: —

"The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against

invasion; and on application of the legislature, or of the executive, (when the legislature cannot be convened,) against domestic violence."

The discovery is, that under the first clause of this section, the United States may require of the States in which the emancipation has taken place, to abolish all distinctions founded upon color, and give to the freedmen the right of suffrage and all other civil rights, because that is necessary in order that those States should possess the republican form of government which the United States is thus bound to guarantee to them; and that the states may be held in military grasp until all this is done, and the constitutional obligation on the part of the United States thus complied with.

I am not aware who is entitled to the credit of this discovery, made for the first time, as a matter of constitutional construction, more than three quarters of a century after the Constitution was adopted. But it is urged, with truth, that this last fact is not conclusive against the construction contended for, because it is only lately that people were put upon inquiry whether this is not the true construction of the clause. May not this be fairly regarded as an admission that it is only recently that such a construction has become necessary in order to effect certain purposes. Why were not people long since put upon this inquiry in reference to Illinois, where until recently no free negro or mulatto was permitted to come and settle without producing a certificate of his freedom, and without giving bond not to become a charge on any county in the State; and a negro, mulatto, or Indian, could not be a witness in any court in the State, in any case against a white person, — where a person having one fourth part negro blood was to be adjudged a mulatto, — and where, by the Constitution, the right of suffrage was confined to the white male inhabitants. Why was not the inquiry made also in relation to Connecticut and other States, where similar restrictions exist upon the right of suffrage? To say that there are but few persons in the free States upon whom such restrictions have operated, is dodging the question, — which is one of principle and not of numbers.

The "Address to the People of the United States," drawn up by the Committee appointed at a meeting of citizens in

Faneuil Hall, in July, 1865, seems to contain the germ of such a construction, rather than to state the proposition, even in its simplest form. And the conclusion appears to be, that it is the right and duty of the United States, to hold those States in the military grasp until the desirable end should be attained, without undertaking to specify upon what course of reasoning that conclusion is based. The Address, while it says that "it is our right and duty to secure whatever the public safety and the public faith require," admits that under the Constitution, most of these subjects of which it speaks are entirely matters of State jurisdiction. A few short extracts will show the general purport of it.

"Once withdraw the powers of war, and admit a State to its full functions, and the authority of the nation over these subjects is gone. It is a State function to determine who shall hold land, who shall testify in State courts, who shall be educated, and how; who shall labor, and how; and under what contracts or obligations, and how enforced; and who shall vote in national as well as State elections.

"Any restoration would be dangerous, which did not secure, beyond all reasonable peril, the abolition of slavery, actual freedom, just rights to the free, and within each State, 'a republican form of government.'

"We do not ask that the nation shall insist on an unconditional, universal suffrage. We admit that States determine for themselves the principles upon which they will act, in the restrictions and conditions they place upon suffrage. All the States make restrictions of age, sex, and residence, and often annex other conditions operating in substance equally upon all, and reasonably attainable by all. Those matters lie within the region of advice from neighbors, and not of national authority. We speak only to the point where the national authority comes in. We cannot require the rebel States, if we treat them as States, to adopt a system, for the sole reason that we think it right. Of that, each State, acting as a State, must be the judge. But in the situation in which the rebel States now are, the nation can insist upon what is necessary to public safety and peace.

"The end the nation has in view is the same as that for which the war was accepted and prosecuted, — the restoration of the States to their legitimate relations with the republic. The condition of things calls for no limitations of times or methods. By whatever course of reasoning it may be reached, upon whatever doctrine of public law it may rest; however long may be the interval of waiting, and whatever may be the process resorted to, the friends and enemies of the

republic should alike understand that it has the powers, and will use the means, to insure a final restoration of the States, with constitutions which are republican, and with provisions that shall secure the public safety and the public faith."

It does not require great sagacity to perceive to what all this tends, but the discovery that it could all be done under the clause of the Constitution by which the United States guarantees to each State a republican form of government, had not then been fully made.

A supplement to the "Daily Advertiser," in December following, contains what may perhaps be regarded as a supplement to the Faneuil Hall address. It is an attempt to sustain the conclusions of that address by an explicit reference to the clause of the Constitution under consideration.

One object of the paper appears to be to vindicate the right of Congress to do whatever may be needful; another object to show that the clause under consideration may be made by Congress the ground for holding the Southern States out of the Union, until the States shall satisfy Congress that there is no imminent danger that those who have always been free will oppress those who have recently become free, in a manner and to an extent inconsistent with republicanism, of which Congress must judge. What guaranty against such oppression is necessary in order to satisfy Congress, is not said. But referring to the guaranty clause, it is remarked: —

"It is a covenant of the United States. It must be the duty of the United States to do what it solemnly promises to do. It can do this only by and through Congress. It is therefore a duty of Congress to discharge this duty of the United States."

The writer then supposes, in order to illustrate his meaning, that —

"'AN ACT to guarantee to every State a republican form of government' should be passed by Congress, providing that 'everything in the Constitution or laws of any State, which deprives as many as one fourth part of the citizens of that State, as ascertained by the last preceding census, of rights or privileges of property, of education, of standing before the courts as parties or witnesses, or of suffrage, which rights or privileges are possessed by the other part of said citizens, which deprivation is founded upon a difference of race or

color between those who possess said rights and privileges and those who are deprived of them, is, and the same is hereby made and declared to be, null and of no force or effect."

He argues in favor of the constitutional right of Congress to pass such an act. And he supposes Congress to say to the States, —

"Be you wise or unwise in your provisions about suffrage, we have nothing to do with you *unless you become non-republican.* Then we must interfere; then we must prevent or annul whatever is thus non-republican. For it is a direct violation of a most distinct guaranty of the United States, of a guaranty which guards the very foundation of our government, which the United States cannot carry into effect except by Congress, and which Congress cannot carry into effect except by preventing or annulling everything that is inconsistent with republicanism. And that it is our duty to do."

The writer adds, —

"I cannot but regard the view that the guaranty clause gives to Congress mainly if not solely a negative and restraining power, as of some importance. And it seems to dispose of the objection founded upon the earlier political history of our country. The framers of the Constitution made no rule for all the States as to the right of suffrage, because this right differed exceedingly in the different States; but all were republican, and this was enough. The Constitution recognized slavery, and therefore the existence of a large body of slaves called for no exercise of this power. But if, in the judgment of Congress, there is imminent danger in any State where this transformation has taken place, that they who have always been free will oppress those who have recently become free, in a manner or to an extent inconsistent with republicanism, here, for the first time, is an occasion for the exercise of this power."

Here is a distinct admission that at the time of the adoption of the Constitution the States were all republican. But the idea that a State holding twenty-five per cent. of its population in abject slavery, without any of the rights of manhood whatever, is a republican State, within the meaning of the Constitution; and that the same State, by emancipating this twenty-five per cent., becomes anti-republican, within the meaning of the same Constitution, if it does not at once confer upon that population the right of suffrage, and all rights usually con-

ceded to citizens, because in such case Congress may please to apprehend that there may be oppression of that class, can have no sound foundation. If it can be supposed that there may be a greater oppression of a class than that found in the state of slavery, how many eloquent speeches have been made in vain.

The writer on criminal law before referred to, contends that the States in question have no government, and that the United States may therefore act under this clause. He says, "the effect of the act of secession was to place the seceded States under liability to be re-clothed by the United States according to the terms of the Constitution."

He adds, that whether his views are correct or not *as regards the effect of this particular provision*, yet it is the view which has all along been entertained by what is deemed the sound and conservative part of our loyal community, *as deducible in some way from the Constitution*. That shows the *animus* precisely. The thing must be done, and so the right to do it is to be deduced in some way from the Constitution.

But an opinion carrying greater weight than this, is that of an eminent jurist, for a long period Chief Justice of Vermont, who in that office, and as a text-writer, has obtained deserved celebrity, and who in a letter to a member of Congress assumes to treat the subject of restoration, in what he intends as a purely legal and logical argument, — in the first part of which he controverts with great success several of the illogical arguments of the political stump speakers.

Of negro suffrage he says, —

"We do not comprehend how the national government have anything to do with that question. The national Constitution formally recognizes that as an inherent and unsurrendered State right. . . . . The elective franchise, and the right of defining it, is one of the fundamental powers of all free government, — one which cannot be taken away, except by the clearest concession, without the utter annihilation of the very first principles of national liberty. And he must be a bold man who would assume to claim that the States have ever ceded this to the nation. . . . .

"If, then, there is any just and proper mode of securing to the blacks that agency and voice in the government which seems so desirable to their proper protection in their present defenceless position, we must look beyond the general law of the elective franchise

in the State and municipal elections, or even as to national elections, since this depends exclusively upon State authority. And in attempting to find some proper way of escape from the embarrassing dilemma, it has seemed to us that it may be done through the organic law of the State, and the obligation imposed upon the nation to guarantee to each of the States a republican form of government.

"This provision of the national Constitution must imply the power in the nation of judging what is a republican form of government. . . . . Unless this provision carries with it the power of judging and determining for themselves what shall be a republican form of government, it would become both useless and impracticable. We must then, conclude that there is hereby reserved to the nation the right of deciding when the States have departed from the republican form of government, and to demand a return, in some way, to that form of government. . . . .

"The nation may, therefore, not only properly insist that slavery shall be abolished by the States, but that they shall give reasonable assurance and guaranty against its reëstablishment. The least which this implies is, that this large accession of free and native population which had in its former dependent state been represented through their superiors, the masters, but which in its present new state is not represented in any form or mode in the organic law of the several States, should in some way have a fair and free opportunity of being heard, in person, or by their representatives, in the creation of a new organic law, which may be said fairly and truly to represent the whole native and naturalized population of the State. This accession of free native population is not by the ordinary process of growth or accretion, but may be properly said to have been brought about by avulsion or sudden accession. And as it is clearly entitled to be represented in some form in the creation of the organic law of the State, and as it is clearly not so represented in its newly-acquired *status*, it seems not improper for the national executive and legislative authority to require of the several States where the rebellion prevailed, and where slavery has been abolished in consequence, that the States shall form new constitutions, giving all the native and naturalized inhabitants a voice therein. This could only be done by having the convention forming the constitution composed of delegates chosen by the vote of the whole people, and then submitted for its adoption to the vote of the whole people. This the national authority may clearly demand as the very least which will produce a republican form of government, — one which they will feel justified in regarding as fully coming within the view of the requirements of the National Constitution." . . . . .

This conclusion is certainly not a logical sequence from the positions of the writer which precede it.

In considering this subject we may start with the proposition, that the war has given no new meaning to the clause of the Constitution requiring the United States to guarantee to every State in the Union a republican form of government. The United States have no greater power, by means of this clause, than they had on the first adoption of the Constitution. The true construction of it as it stood on its adoption, is its true interpretation at the present time. What it was then, it is now. What it meant then, it means now. What might have then been done under it, may be done now; and what could not then have been rightly and lawfully done under it, if attempted to be done now, will be an attempt at usurpation or revolution.

The true construction may or may not be presented in a clearer light by the logic of subsequent events. But that logic cannot change the provision so as to make it what it was not when it was adopted.

We come, then, to the inquiry, what is the true meaning and construction of this provision as it existed on the adoption of the Constitution, and as it exists at the present time?

In this, as I have already said in general, we may best determine the true construction of the Constitution by a study of its history. This, fortunately, is, in the main, open to us. Its formation was not so remote that the necessities which led to it, the purposes of its framers, the discussions respecting its different provisions, the difficulties it encountered, and the particular objections to its adoption, cannot be substantially traced at the present day. And it is to these that we are to resort, in most instances, where doubts exist respecting its meaning. Words change, views change, party purposes change, arguments change. The facts which have happened may be misrepresented, but cannot change. When we have the certainty of their existence, they are safe guides from which to derive the interpretation of the language which was used in connection with them. It is a familiar principle of the law, that a declaration accompanying an act, and tending to elucidate it, may be given in evidence to show the true character of the act. In like manner the circumstances under which a declaration is made, may serve to interpret the language, and give a character to the declaration.

But an argument founded upon the general circumstances attending the origin and adoption of the Constitution, may be superfluous in this case, because the reason for the incorporation of the provision in question into the Constitution, and its true interpretation at that day, is made perfectly clear, by a reference to the "Madison Papers," and to the "Federalist." We can trace this provision from its inception, in a somewhat different form, in the mind of Mr. Madison, as set forth in a letter to Governor Randolph; through all the stages by means of which it assumed its present shape, having had its origin in an idea that the Constitution ought to contain a provision expressly guaranteeing the tranquillity of the States against internal as well as external dangers. It appears that the resolution at first introduced into the convention was, that "a republican government and the territory of each State, except in the instance of a voluntary junction of government and territory, ought to be guaranteed by the United States to each State;" that it was altered in the committee of the whole, so as to read, that "a republican constitution, and its existing laws, ought to be guaranteed to each State by the United States;" that when this proposition came up for consideration an objection was made to guaranteeing the existing laws of the several States, a member saying that he "should be very unwilling that such laws as exist in Rhode Island should be guaranteed,"— to which it was answered, "the object is merely to secure the States against dangerous commotions, insurrections, and rebellions;" that Mr. Madison moved to substitute, "that the constitutional authority of the States shall be guaranteed to them, respectively, against domestic as well as foreign violence;" whereupon a member said, he "was afraid of perpetuating the existing constitutions of the States,— that of Georgia was a very bad one, and he hoped would be revised and amended;" that Mr. Randolph moved to add, as an amendment to Mr. Madison's motion, "and that no State be permitted to form any other than a republican government;" whereupon "Mr. Wilson moved, *as a better expression of the idea*, that a republican form of government shall be guaranteed to each State, and that each State shall be protected against foreign and domestic violence." This seeming to be well received, Mr. Madison and Mr. Randolph withdrew their propositions, and on the question for agreeing to Mr. Wilson's motion, it passed *nem con.*"

We have in this brief history the origin of this provision; its shape when introduced into the convention, embracing a guaranty of the territory of each State; its change to a guaranty of the Constitution, and the existing laws of each State; the objections to it in that form; the motions to amend, until "a better expression of the idea" was reached in the adoption of a proposition, the first clause of which was substantially the clause in question as it now stands in the Constitution. And it is perfectly evident that the expression of the idea thus reached, had in it no element whatever authorizing, or tending to authorize, the construction which has recently been attempted to be put upon this section.

The change by which the words, "that a republican form of government shall be guaranteed to each State," were made to read as at present, "the United States shall guarantee to every State in this Union a republican form of government," which in no manner affects the meaning or effect of the clause, arose from objections which were afterward made to the latter part of the amendment, adopted on motion of Mr. Wilson. These objections were founded upon a fear that a provision, "that each State shall be protected against foreign and domestic violence," unless some limitation should be placed on the general language of it, might give to the United States a dangerous power of interference in the internal concerns of the States; and to guard against this, it was altered, through several amendments, until it was limited as it stands at present in the Constitution. In the forty-third number of the "Federalist," Mr. Madison, commenting on this section, says: —

"In a confederacy founded on republican principles, and composed of republican members, the superintending government ought clearly to possess authority to defend the system against aristocratic or monarchical innovations. The more intimate the nature of such an union may be, the greater interest have the members in the political institutions of each other; and the greater right to insist, that the forms of government under which the compact was entered into, should be *substantially* maintained. . . . .

"It may possibly be asked, what need there could be of such a precaution, and whether it may not become a pretext for alterations in the State governments, without the concurrence of the States themselves. These questions admit of ready answers. If the interposition of the

general government should not be needed, the provision for such an event will be harmless superfluity only in the Constitution. But who can say what experiments may be produced by the caprice of particular States, by the ambition of enterprising leaders, or by the intrigues and influence of foreign powers? To the second question it may be answered, that if the general government should interpose by virtue of this constitutional authority, it will be of course bound to pursue the authority. But the authority extends no further than to a *guaranty* of a republican form of government, which supposes a preëxisting government of the form which is to be guaranteed. As long, therefore, as the existing republican forms are continued by the States, they are guaranteed by the Federal Constitution. Whenever the States may choose to substitute other republican forms they have a right to do so, and to claim the Federal guaranty for the latter. The only restriction imposed on them is, that they shall not change republican for anti-republican constitutions; a restriction which, it is presumed, will hardly be considered as grievous."

It is almost wonderful how fully and completely this account of the origin, progress, and adoption, of this guaranty of a republican form of government, refutes and destroys all the glosses which have lately been attempted to be put upon it, as an authority for the United States to interfere in the internal concerns of the States.

There are other considerations showing that it had not, and could not have had, any regard to State laws with respect to race, color, class, suffrage, testimony, or anything of that character.

The language of the clause in question is that of *obligation* on the part of the United States. Slavery then existed in nearly every State. In but very few of them could free negroes vote; in many they could not testify in courts in a controversy in which a white man was a party; and in others there was an exclusion of large numbers of the people from the right of suffrage, confining it, in some instances, to freeholders alone.

If the exclusion of large numbers of the inhabitants from the right of suffrage, could prove that the State making the exclusion has not a republican form of government, then not only were several of the States not republican in their forms of government when the Constitution was adopted, and the guaranty thus broken immediately after it was made, but the framers of the Constitution knew that it would be thus broken, for they knew

that no change in the forms of the State governments was contemplated. This is charging upon the framers of the Constitution not merely foolishness in adopting the provision, but criminal negligence in making no attempt to enforce it. That generation passed away and another followed it, and still the provision remained a dead letter. It was reserved to the "third and fourth generation" to make a new discovery respecting the meaning of it.

It has been said that mere neglect to enforce the provision cannot prove that the new construction is not the true one. But the case of Rhode Island, where the controversy respecting the exclusion of all but freeholders from the right of suffrage, terminated in what has been denominated the "Dorr Rebellion," called for a careful consideration of the right and duty of the United States to interfere for any such reason.

Again: if the exclusion of large numbers of people from the right of suffrage, &c., proves that a government is not republican, then the United States is not, and never has been a republican government; for the convention which framed the Constitution, with a full knowledge of these exclusions in the different States, deliberately adopted the State rule as the basis of suffrage for the election of representatives in the Congress of the United States, and provided that the senators of the United States should be elected by the legislatures of the several States, the members of those legislatures having of course been elected where such exclusion existed.

Furthermore, we have seen that it is admitted that the States were all republican on the adoption of the Constitution. If any of them are not so now, it is because of recent changes. But the only change which is suggested, as affecting this question, is that which regards the freedmen, and which has arisen from the emancipation of the slaves.

This change was effected by the United States. Whether it was produced by the proclamation of President Lincoln, or by the operations of the war, or by the requirement to alter the State constitutions, or by the amendment of the Constitution of the United States, it has been accomplished by the United States.

Now the argument and conclusion are irresistible, that if this change has so affected any State that its form of government is

not thereby republican, then the United States have made the form of government anti-republican, and have thereby violated their guaranty; and the remedy in that case would be to retrace their steps, and thus place the State back in the situation of a State with a republican form of government.

Slavery was not the cause that the form of government is not republican, within the meaning of the terms "republican form of government," as used in the Constitution. That is admitted, and must be admitted. Upon the argument which we have been considering, it is the emancipation which makes the form of government anti-republican, because the emancipation frees the slaves without giving them a right to vote.

But the United States cannot say we have deprived you of a republican form of government, and now you must make another Constitution, such as we shall dictate, that we may thereby perform our constitutional obligation to guarantee to you a republican form of government.

If these principles are correct, there is no constitutional power in Congress to admit, or to deny admission to, these disorganized States.

Say that the rebellion embraced a large majority of the population of those States, and that the rebellious spirit exists still, on the part of numbers, so as to require the presence of a military force there to secure the keeping of the peace. That does not prove that the people who are no longer rebels have lost their right to their State governments, or to their representation in Congress. Any military occupation, beyond what is necessary for the preservation of the peace, would be unwise, and any subjection to martial law would be usurpation. It will not do to say that the war is not over, after the rebels have laid down their arms and submitted themselves to the law, and there is no force attempting to make war, or to resist the authority of the United States.

And in like manner, any attempt by either House of Congress, to hold those States out of the Union, under the pretext that each House of Congress, being the judge of the election of its own members, must judge whether a State claiming to be one of the United States, is in the Union or not, and may determine that these States are not in the Union, until it shall please the members of Congress to be satisfied of the loyalty

of the people there, is unconstitutional also. The power to judge of elections is not given to be exercised for any such purpose.

Doubtless if Cuba, assuming to be a State in the Union, should elect senators and representatives, each House of Congress might refuse to admit them as members, upon the ground that Cuba was not a State in the Union, and so not entitled to be represented. She never was in the Union. Of that fact each House must take notice. Such refusal to admit, would not be in effect turning her out of the Union. The case is altogether different where a State has been regularly in the Union, could not take herself out, has not been expelled, and still claims her privileges as a State. It would be wholly unconstitutional for either House of Congress, upon the question of the admission of members from Connecticut, to decide that that State had forfeited her rights as a State, because she had not conformed to the progressive spirit of the age, and granted the right of suffrage to her negro population; or to determine that her refusal to permit the negroes to vote, showed that she had not a republican form of government, and that she could not be represented, until *such form of government should be guaranteed to her, by an Act of Congress extending the right of suffrage in that State.*

The two Houses of Congress may judge of the qualifications of persons elected, as they might have done prior to the rebellion, judging fairly in that respect, according to law, as a court tries a case upon its merits, but not upon extraneous considerations. For the qualifications of members we must look to the Constitution and laws, and not to partisan feeling, or mere party dogmas.

We shall do ourselves less than justice if we fear that the admission of the Southern members will endanger the Union. We shall do ourselves and them a wrong, if we refuse them admission to their seats, because we fear that this will endanger a party ascendency.

So long as our government is one of principle, it will stand. When it becomes corrupt, "a republican form of government" will not save us.

APPENDIX.

Note A. See p. 14.

It was ordered by the Court of the Colony of Connecticut, ("according to the conclusions of the Commissioners of the United Colonies of New Haven, Anno 1646,") [? 1643] that in case of wilful wrongs and hostile practices of the Indians against the English, the "magistrates may, at the charge of the plaintiff, seize and bring away any of that plantation of Indians that shall entertain, protect, or rescue the offender," .... "only women and children to be sparingly seized, unless known to be some way guilty;" and if satisfaction was denied, "that then the magistrates deliver up the Indians seized to the parties endamaged, either to serve or *to be otherwise disposed of, in the way of merchandise*, as the case will justly bear." — Laws of Connecticut Colony, 32, 33.

If servants run away from their masters it was lawful for the next assistant or commissioner, or if none, then "the constable and two of the chiefest inhabitants, to press men and boats, or pinnaces, (if occasion be,) at the public charge, to pursue and bring them back by force." — Ib. 47.

The Colony of Massachusetts, while it bore its testimony against manstealing, and ordered the negro interpreters and others unlawfully seized to be sent back to Guinea, early recognized the right to enslave "such lawful captives, taken in just wars, as willingly sell themselves, or *are sold to us.*" And a province law, in 1718, made the master of a vessel who should transport beyond seas any *bought* or hired *servant* or apprentice, liable to a fine and to damages to the master or *owner* of such transported person.

Encouragement to escape, or protection to fugitive slaves or servants, was not the fashion of that day in New England.

How far the "covenant with death and hell," found in the Constitution of the United States, had its prototype in these earlier proceedings in New England, I leave for the curious to inquire.

Note B. See p. 20.

There has been an attempt to maintain that the States were never sovereign, but that a part of the sovereignty always resided in the Congress of the United States, or in the whole people of the United States, as an entire body. The history of the Colonies — of the adoption of the Declaration of Independence, and of the subsequent formation of the Confederation, through

the articles framed in 1777, and signed by delegates from most of the States in 1778, others giving in their adhesion from that time till 1781 — proves, that any theory of sovereignty in the United States as a whole, except by and through the delegation of power from the States, or the people of the several States, after they became independent, and so sovereign States, cannot stand the test of examination.

The several colonies were distinct, neither having any power over the other. Their several dependence upon the crown of Great Britain had no effect to make them one people. The confederation of the New England colonies, in 1643, was but temporary. An attempt at a more extensive confederation failed. It was not until 1774 that they had any united action, and it was then merely by mutual consent, for the time being, for the common defence. The congress of delegates, in the first instance, had no powers of sovereignty whatever. The common danger and the common interest induced the people of the several colonies to act together to promote the interest of each and of all. The people of the several colonies authorized their delegates to unite in a common Declaration of Independence. All the authority to make this Declaration was derived from the action of the people of each colony, acting separately. And the Declaration itself, pursuing the authority given to make it, is that the former colonial organizations are now, of right, free and independent States; that, as such, they have full power to levy war, conclude peace, and do all other acts and things which independent States may of right do. The Articles of confederation, which were not finally agreed to in Congress until the expiration of sixteen months afterwards, and which were not signed until more than two years after the Declaration, special authority being given by the several States therefor, declare, in the second article above quoted in the text, that each State retains its sovereignty, &c. Where had the sovereignty resided from the time of the Declaration up to the time of the adoption of the Articles of confederation. If Congress, in the intermediate time, can be said to have exercised any sovereign power, it was because the several States, through their delegates, from time to time voluntarily united in the act. That is to say, each State exercised a portion of its sovereign power, in connection with the others, exercising each a portion of sovereign power.

Note C. See p. 55.

In 1855, his Excellency the Governor, in his Address to the members of the Legislature, remarked: —

"While we acknowledge our fealty to the Constitution and the laws, the oft-repeated cry of disunion heralds no real danger to our ears. While we honestly concede the common duties evoked by the articles of confederation, we will preserve inviolate the State rights retained for each sovereign member of that confederacy. With fraternal feelings to all her sister States, and filial devotion to their common parent, yet with acknowledged rights, and a determination that they be maintained, *there stands Massachusetts.*

"Of those rights, the two cardinal ones are the *habeas corpus* and the

trial by jury. It is submitted to your deliberations, whether additional legislation is required to secure either of these to our fellow citizens. Scrupulously avoid such action as asserts or looks to the maintainance of any rights not clearly and constitutionally ours, *but weave every safeguard you justly may around those primal birthrights, older than our national birthday, and dear as its continued existence.*"

The joint standing committee on Federal Relations, to whom this part of the Address was referred, incorporated into their report divers extracts from the Constitution of Massachusetts, asserting the rights and liberties of the people, with extracts from the amendments to the Constitution of the United States relative to security against unreasonable searches and seizures, and to the right of trial by jury, and the privilege of the writ of habeas corpus; and then proceeded to say: —

"From these explicit declarations in our fundamental constitutions, your Committee draw the inference that the framers of our government, both State and National, intended to protect alike the liberties of all their citizens, the weak as well as the powerful, the poor as well as the rich. No distinction of class, or color, or race is made. On the contrary, they throw the broad ægis of constitutional protection over all.

"Massachusetts stands second to no State in this Union in loyalty to the provisions of the Constitution of the United States. But when she is asked to violate the fundamental provisions of *that* Constitution as well as her own *she unhesitatingly throws herself back on her rights as an independent State. She cannot forget that she had an independent existence and a constitution before the Union was formed.* Her constitution secured to every one of her citizens the right of *trial by jury*, and the privilege and benefit of the writ of *habeas corpus*, whenever their liberty was at stake.

"*These essential elements of independence she has never bartered away. She will not suffer them to be wrested from her by any power on earth.*"

Presidential proclamations instituting martial law, and suspending the *habeas corpus* throughout the whole country had not then been issued; nor had Whiting's "War Powers of Congress and of the President" then been written. When these things did come, no class of persons submitted more tamely to the suppression of the *trial by jury*, and of the writ of *habeas corpus*, than that class which in 1855 so unhesitatingly threw Massachusetts back on her rights as an independent State; and asserted so valiantly that she would never suffer them to be wrested from her by any power on earth.